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No. 164.

In the

Supreme Court of the United States.

October Term, 1917.

WILLIAM J. ANICKER, - - *Appellant,*

VERSUS

DAVID GUNSBURG, *et al.,* - *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

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The action of the Secretary in disapproving the plaintiff's lease and approving the defendants' lease involved the exercise of his official discretion in the discharge of administrative powers, and his judgment and decision, whether induced by an erroneous construction and application of the recording laws or not, is not reviewable by the courts..... 9

When boiled down, plaintiff's whole case is built on the theory that where there are two separate antagonistic leases, and the second lessee is a bona fide purchaser without notice, the Secretary must approve the second lease, or disapprove both. That is, where there are two conflicting leases on the same land executed by the same lessor, the Secretary has one of two alternatives—he may veto both or approve the second. That is plaintiff's whole case and contention. Yet, if that be sound, the lessor can by executing a second lease to a bona fide purchaser, absolutely destroy the first lease and deprive the Secretary of his discretion to approve the first lease, although he disapproves the second lease. Suppose the second lessee is a bona fide purchaser, the Secretary is certainly not compelled to disapprove the first lease because he disapproves the second lease..... 11

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In this case the Secretary was not required to construe the recording laws, or determine, *first*, the question of bona fide purchaser, and *second*, affix, as a ministerial act, his approval to plaintiff's lease if he decided, under the recording laws, plaintiff was a bona fide purchaser. 40

Take this case: Suppose we concede for argument that the Secretary construed the recording laws erroneously, the "very most" plaintiff can say is that the Secretary's final decision was influenced thereby. But how can the court find from the record that the Secretary but for such error would have approved plaintiff's lease? And yet that is what the court must find before plaintiff can have the semblance of a case. 41

In cases before the land department involving the rights of a party to a patent, the rights of the claimant are absolutely fixed by the law as applicable to the facts, and where the department fails to award the land and issue a patent to the rightful claimant, the court will review the *judgment*, of the department, and the power and jurisdiction of the courts do not depend on the department expressing an er-

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roneous opinion. The absence of a written opinion, or expressed reasons, does not deprive the rightful claimant to relief in the courts. The *judgment* of the land department, and not the expressed opinion, is what the courts review. But in this case, if the Secretary had simply disapproved plaintiff's lease and approved defendants', without expressing any reasons, it must be held the courts would have no jurisdiction to inquire into, review or set aside the judgment of the Secretary, that judgment being rendered in the exercise of his official and administrative discretion. Consequently, by what authority can the courts exercise jurisdiction to review and set aside the same judgment of the Secretary because he may have expressed an erroneous reason for his disapproval of plaintiff's lease, when in the absence of any expressed reason this same judgment would be absolutely impregnable to attack?. 48

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The Secretary, in the very opinion in which he said that, "If there were any advantage in the prior filing of the lease * * * Anicker would have that advantage," also said in that same connection that until approved a lease is not a completed instrument, and that "the fact of its having been recorded in a county office

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can not estop the Secretary from finding that another lease regularly executed and filed is more for the allottee's interest and better entitled to approval.". 64

Whether the defendants were entitled to the approval of their lease, and whether the Secretary erroneously and wrongfully approved their lease, are not questions of any importance; the plaintiff, in order to set up a trust, must affirmatively show an antecedent equity and a vested right to the approval of his lease, and that the Secretary wrongfully, and by clear mistake of law, erroneously disapproved his lease. 69

Plaintiff not only fails to affirmatively show that he was entitled to the approval of his lease, but the record before the Secretary affirmatively shows that the plaintiff's lease, as taken by him on March 28th, 1912, and filed in the office of the Indian Superintendent at Muskogee, on March 30th, was, independent of all consideration of the defendants' lease, not entitled to approval and would not have been approved. 79

If Anicker obtained his lease without either actual or constructive notice of the defendants' prior lease, yet, that did not entitle him to favorable consideration under the facts in this case, because the Indian Superintendent clearly found and expressly reported that the bonus offered by Anicker was inadequate, and also

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that the bonus offered by defendants was inadequate, and the inference is clear and conclusive that if Anicker had stood on the status he acquired on March 28, 1912, and declined to increase his bonus offer, his lease would have been disapproved. Neither Anicker, nor defendants were in a position to demand of the Secretary favorable consideration, and if they had maintained the status acquired by them at the time they obtained their respective leases, the Secretary would have disapproved both leases. At the time Anicker increased his bonus bid he had actual and constructive notice of defendants' lease. This within itself, granting for the sake of argument every legal contention of the plaintiff, defeats his action, and bars a successful appeal to a court of equity to set aside the Secretary's disapproval of his lease. 99-100

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1917.

No. 164.

WILLIAM J. ANICKER, - - *Appellant,*

vs.

DAVID GUNSBURG, *et al.*, - *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *for* APPELLEES.

May It Please the Court:

This suit is in effect an appeal to a court of equity from the action of the Secretary of the Interior in disapproving appellant's lease (plaintiff below) and approving appellees' lease (defendants below).

We shall refer to the parties as plaintiff and defendants.

The plaintiff, after the cause was removed to the federal court, filed an amended petition, setting forth substantially the same claims set forth in the original petition, and relying upon the same Acts of Congress, etc. With the exception of one very material feature pertaining to the plaintiff's claim, that he is a *bona fide* purchaser, the alleged cause of action is the same in both the original and the amended petition. The plaintiff's amended petition alleges the following facts:

First.

That the lessor, Eastman Richard, is a full-blood Creek Indian, and duly enrolled as such.

Second.

That on March 20, 1912, the said Indian allottee, executed and delivered to defendants a departmental oil and gas mining lease covering the eighty (80) acres in question, said lease being executed on the departmental form and in accordance with the rules and regulations of the Secretary.

Third.

That the defendants did not file their lease for record in the office of the Register of Deeds of Creek County, Oklahoma, the County in which the land is situated, until some time after the lease was approved by the Secretary.

Fourth.

That the defendants did not file their lease in the office of the United States Indian Superintendent at Muskogee, Oklahoma, until April 5, 1912.

Fifth.

That on March 28, 1912, eight days after the defendants obtained their departmental lease, the Indian allottee, in consideration of Fifty ($50.00) Dollars then paid to him by plaintiff, executed and delivered to the plaintiff a similar departmental oil and gas mining lease upon the same land, and upon the form prescribed by the Secretary and in accordance with his rules and regulations.

Sixth.

That on March 30, 1912, plaintiff filed his lease in the office of the United States Indian Superintendent at Muskogee, Oklahoma, in accordance with the rules and regulations of the Secretary.

Seventh.

That the plaintiff also on April 1, 1912, filed his lease in the office of the Register of Deeds of Creek County for record.

Eighth.

That a contest arose before the Interior Department between the plaintiff and defendants as to which of the leases should be approved by the Secretary, and that during the contest, evidence was sub-

mitted to the Department; that the contest before the Department revolved around the issue as to which of the parties was entitled to priority, and that the Department, both the Indian Superintendent at Muskogee, the Commissioner of Indian Affairs, and the Secretary of the Interior, found as a fact that the plaintiff was a *bona fide* purchaser of his lease without any notice or knowledge that eight days previously the allottee had executed a lease to defendants.

NOTE: In the *original* petition filed by plaintiff, he alleged that at the time he obtained his lease, "he was not aware that said Eastman Richard had previously made a conflicting lease to the defendants, Gunsburg and the Southwestern Petroleum Company, and was not aware of any facts charging him with notice or knowledge of the existence of said lease." Plaintiff further alleged in his original petition "that on, to-wit: said March 28, 1912, said Eastman Richard stated to plaintiff, Anicker, that he had leased the east half of the northeast quarter of said section five, being eighty acres, to other parties, but that he had not leased the *west* half of said northeast quarter to any body by any lease then existing; that thereupon using the prudence and diligence that should be used by a reasonably careful man, the plaintiff examined the records in the office of the United States Indian Superintendent at Muskogee,

and there found that said lease so made to said Funk and Riter covering the *east* half had been filed in said office, but there was no lease filed on the *west* half of the northeast quarter; that thereupon plaintiff caused investigation to be made in the office of the Register of Deeds for Creek County, Oklahoma, and found no lease on record there covering said *west* half of the northeast quarter." (See Rec., pp. 2 and 3.)

By the above allegations the plaintiff tendered the issue as to whether or not he was in fact a *bona fide* purchaser of his lease, and this issue was met by the defendants in their answer to the original petition.

Beginning at the bottom of page 6 of the record, the court will find contained in the stipulation shortening the record in this court this statement: "And further defendants' original answer denied that the plaintiff purchased his said lease from Eastman Richard without notice of the defendants' lease, and denied all the plaintiff's allegations on the subject of actual or implied notice."

In plaintiff's amended bill (Rec. pp. 7 to 17) he abandoned his allegation that he was in fact a *bona fide* purchaser, and contented himself by alleging that the Interior Department found as a fact that he was a *bona fide* purchaser.

In paragraph twelve of the plaintiff's amended bill (Rec., p. 12) it is alleged that by the decision of the Secretary it was determined that plaintiff was a fit lessee, and a *bona fide* purchaser of his lease.

The original and amended bill (see Rec., pp. 13 and 14) set forth an assignment of errors whereby plaintiff purports to show wherein the Secretary committed error in his decision. In this assignment of errors he seems to assume that all the world rose up and proclaimed him an innocent purchaser.

Upon his allegations plaintiff claims that the prior lease executed by the Indian to defendants on March 20, 1912, was null and void as against him and that in a contest between him and the defendants over which lease should be approved, the Secretary erroneously construed and applied the provisions of the Act of Congress of March 1, 1907 (34 Stat. L. 1026), wherein it is provided that

> "The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

That likewise the Secretary erroneously construed and applied section 20 of the Act of Congress approved April 26, 1906 (34 St. L. 137), said section 20 being as follows:

> "That after the approval of this act all leases and rental contracts, except leases and

rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided, further*, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

Likewise, that the Secretary erroneously construed and applied the recording laws in force in the State of Oklahoma, if the recording laws of Oklahoma are applicable, and if not applicable, then the Secretary erroneously construed and applied sections 670 and 671 of Mansfield's Digest of Laws of Arkansas put in force in the Indian Territory by Act of Congress of February 19, 1903.

Likewise plaintiff alleges that the Secretary erroneously construed and applied a rule promulgated by him, and in force at the time these respective leases were executed, said rule being as follows:

> "All leases shall be in quadruplicate, and, with the papers required, shall be filed within thirty days from and after the date of execution by the lessor with the United States Indian Agent at Union Agency, Muskogee, Oklahoma."

The record shows that evidence was taken before the United States Indian Superintendent, and after a full hearing, the fairness and sufficiency of which is not challenged by the plaintiff, the Secretary disapproved, on September 24, 1912, the plaintiff's lease, and approved the defendants' lease.

Plaintiff alleges that the Secretary having found him to be an innocent purchaser of his lease, defendants' lease was *therefore and thereby* rendered null and void, and that the Secretary fell into a clear error in the construction of the law applicable, and on account of his error of law, the Secretary approved defendants' lease, whereas, if he had correctly construed and applied the law, he would have approved the plaintiff's lease. Conceding everything claimed by the plaintiff in his pleadings, the defendants insist that this is not a case wherein the decision of the Secretary, either on the law or the facts, can be reviewed, reversed or vacated by the courts. The bill presents no justiciable issue. *The Secretary was not compelled or bound to pass upon the legal questions presented by the contestants.* It was for him to choose which of the two lessees he preferred, and certainly in the absence of fraud the presumption is conclusive that the Secretary, in the exercise of his official discretion, *did what he considered to be for the best interest of the Indian.*

Point One.

The action of the Secretary in disapproving the plaintiff's lease and approving the defendants' lease involved the exercise of his official discretion in the discharge of administrative powers, and his judgment and decision, whether induced by an erroneous construction and application of the recording laws or not, is not reviewable by the courts.

Eastman Richard being a full-blood Creek Indian, and duly enrolled as such, could not make a valid oil and gas mining lease except with the approval of the Secretary of the Interior. Section 2 of the Act of Congress approved May 27, 1908 (35 St. L. 312), among other things provides:

> "That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, *under rules and regulations provided by the Secretary of the Interior, and not otherwise.*"

Plaintiff admits the lessor could not make a lease for oil and gas mining purposes except "with the approval of the Secretary of the Interior." Section 20 of the Act of Congress approved April 26, 1906, referred to in the plaintiff's petition, among other things provides:

> "That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

Whether leases for oil and gas purposes are eligible to record prior to their approval by the Secretary; whether the Secretary's rule allowing thirty days for the filing of a lease in the office of the United States Indian Superintendent at Muskogee is valid; and, whether the failure of the defendants to either place their lease on record in the office of the Register of Deeds, or file their lease in the office of the United States Indian Superintendent at Muskogee prior to the date the plaintiff obtained his lease, are material, *presented questions which did not and could not control, limit or restrict the power and discretion of the Secretary to disapprove any lease submitted to him for his action.* Whether or not the Secretary gave a correct construction and application of the various recording laws, and his thirty-day rule, *are not questions which the Secretary was bound or compelled to decide*, and if he did decide such questions, and construe said acts, and interpret their application, an erroneous construction of said acts did not have the effect in equity of *approving plaintiff's lease or nullifying his approval* of the defendants' lease, or confer upon the courts jurisdiction to reverse the action of the Secretary and disapprove the

defendants' lease and approve the plaintiff's lease, or accomplish the same result by decreeing defendants' lease to be held in trust by them for plaintiff.

The Secretary could have disapproved both leases, and neither party would have had any rights in court to review, or set aside the Secretary's disapproval. Plaintiff's counsel admit this proposition.

When boiled down, plaintiff's whole case is built on the theory that where there are TWO separate antagonistic leases, and the second lessee is a bona fide purchaser without notice, the Secretary must approve the second lease, or disapprove both. That is, where there are two conflicting leases on the same land executed by the same lessor, the Secretary has one of two alterantives—he may veto both or approve the second. That is plaintiff's whole case and contention. Yet, if that be sound, the lessor can by executing a second lease to a bona fide purchaser, absolutely destroy the first lease and deprive the Secretary of his discretion to approve the first lease, although he disapproves the second lease. SUPPOSE THE SECOND LESSEE IS A BONA FIDE PURCHASER, THE SECRETARY IS CERTAINLY NOT COMPELLED TO DISAPPROVE THE FIRST LEASE BECAUSE HE DISAPPROVES THE SECOND LEASE.

Undoubtedly the Secretary has the authority, in the exercise of his sound discretion, to approve the

first lease. Because he disapproves the *second* lease held by the *bona fide* purchaser does not compel him to disapprove the *first* lease. Treating the *first* lease as null and void as against the *second* lease, the one held by the *bona fide* purchaser, yet the *first* lease is valid and binding on the lessor, and he cannot be heard to question its validity. He is a wrongdoer, and committed a fraud on the *first* lessee by executing the second, and no person will be permitted in equity to take advantage of his own wrong. When the Secretary disapproved the *second* lease, he undoubtedly had authority to approve the *first* lease, and in the exercise of his discretion, with a view to the best interest of the Indian, there can be no doubt about the Secretary's right to disapprove the *second* lease, with the distinct intent to approve the *first* lease. The Secretary may disapprove the *second* lease for the express purpose of removing it as an obstacle in his way to approve the *first* lease. And, upon the *second* lease being disapproved, the *second* lessee, although a *bona fide* purchaser, has no further standing, because he has nothing to base his rights upon, his lease having been expressly vetoed by the Secretary.

There is no law or Act of Congress making it the duty of the Secretary to approve any particular lease; there is nothing in the Acts of Congress prescribing or defining what lease or sort of lease the

applicant, for the Secretary's approval, must present; and, most fatal of all to the plaintiff's case, there is nothing in the Acts of Congress designating what the applicant must do upon proof of compliance therewith, makes it the absolute and *ministerial* duty of the Secretary to approve the lease. All is left to the discretion of the Secretary. *There is nothing the lessee can do making the Secretary's approval follow as a matter of course.*

Analyzing the plaintiff's suit from any standpoint, it is nothing more nor less than an application to the court to reverse and set aside the Secretary's approval of the defendants' lease, and then assume jurisdiction to approve the plaintiff's lease. The plaintiff in form seeks to set up a resulting trust in the leasehold estate now standing in the defendants, but the effect of any judgment in favor of the plaintiff is equivalent to the reversal of the Secretary's decision approving defendants' lease, and disapproving the plaintiff's lease, and equivalent to the court assuming jurisdiction to approve the plaintiff's lease over the veto of the Secretary.

Without here analyzing the decision of the Secretary in this case, and without stopping to analyze the evidence and the record, but for the present assuming, but not conceding, that the Secretary did fall into a clear error of law in construing and applying the recording laws, and on account of a clear error

of law, was induced to disapprove the plaintiff's lease and approve the defendants' lease, the Secretary had jurisdiction, and exclusive jurisdiction, to approve or veto one or the other, or both, of the said leases, and that in the exercise of his jurisdiction conferred by Congress, any error of law influencing his decision to approve one lease and disapprove another, cannot be corrected by the courts.

While the doctrine that the king can do no wrong, theoretically, has no place in our governmental institutions, yet, Government is the institution of man, and is conducted by man. No Government is perfect, nor free from error. The powers of our Government are distributed between three separate, independent, but co-ordinating and co-operating, branches, to-wit: the executive, legislative and judicial. Each is supreme within its sphere.

The Federal Government is the guardian of these Indians, and is still the guardian of full-bloods. *Tiger* v. *Western Investment Company*, 221 U. S. 286. The administration of Indian affairs has been largely delegated by Congress to the executive department. In the exercise of their executive duties Cabinet officers act for and represent the President as the supreme heads of the executive department. It has never been the policy of American courts to control by mandamus, or review, reverse or modify, through proceedings in equity, the executive and dis-

cretionary acts of executive officers of the Federal Government. Such review by the courts would make them the supreme executive tribunals of the Nation, and destroy the independence of one of the co-ordinate branches of the government. The refusal of the courts to review the administrative acts of executive officers is not based on the theory that executive officers can do no wrong or commit no error. This government is no Utopia. Courts themselves make errors. Their judgments and decrees, whether right or wrong, where they have jurisdiction over the person and the subject, are binding on all the world. Courts frequently overrule their former decisions, and thus confess their error in a prior case.

A District Court may base its decision and judgment upon a certain view of the law, and where there is no appeal, its judgment is final and binding on all the world, though this court may announce in some other case between different parties, an entirely different construction of the law. If the time for appeal has expired before this court announces a different construction of the law, then the parties in the District Court are without remedy, and all the world is bound by that decree. It may be wrong. There is no remedy. The courts will not inquire into the decision of the District Court in a collateral proceeding.

In *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. 317, the Eighth Circuit Court of Appeals said:

"Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud."

—*Hine* v. *Morse*, 218 U. S. 493;

Flanrigan v. *Chapman & Dewey Land Company*, 144 Fed. 371 (8 Cir. Ct. Ap.);

Kretsinger v. *Brown*, 165 Fed. 612 (8 Cir. Ct. Ap.).

Likewise, the decision of the Secretary, acting within the scope of his jurisdiction, binds the parties and is conclusive on all the world, and cannot be inquired into in any court proceeding. The Secretary was acting within the scope of his jurisdiction when he disapproved one lease and approved another, and if he made an error on some legal point, which error influenced his judgment, that would not avoid his approval of one, and disapproval of the other. *What the Secretary's action and decision would have been in the absence of error of law, cannot in the very nature of things be discovered, and the record in this case does not disclose anything indicating that the Secretary would have approved the plaintiff's lease but for an error of law.* Thus, in *U. S.* v. *Hitchcock*,

205 U. S. 81, 51 L. ed. 718, Mr. Justice HOLMES, in discussing this exact point, said:

> "Even if those given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the Secretary's grounds. He has not disclosed to the court any statement of those grounds purporting to be exhaustive and complete, and the court cannot make an inquisition into his mental processes to see whether they were correct. See *De Cambra* v. *Rogers*, 189 U. S. 119, 122, 37 L. ed. 734, 735, 23 Sup. Ct. Rep. 519."

In *United States* v. *California and Oregon Land Company*, 148 U. S. 32-43, this court had under consideration an act conferring upon the Governor of the state, power to determine when certain things had been done, that is—certain sections of the railroad completed—which act reads: "When the Governor of said state shall certify to the Secretary of the Interior that any continuous ten miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, must be sold, and so from time to time until said road is completed." The Governor had made such certificate and it was contended in the litigation that the certificate was false, and that consequently no title had passed to the land in question. Discussing the binding effect of the decision of an officer having jurisdic-

tion, especially when the exercise of his jurisdiction involved discretion, this court said:

> "Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691, 729 (8: 547, 561) this court said: 'It is a universal principle, that, where a power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, (citing authorities), judicial, (citing authorities), or special (citing authorities), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

Justice Brewer also cited in support of the above the following cases:

Foley v. *Harrison*, 56 U. S. 15 How. 433, 448 (14: 761, 767);

Johnson v. *Towsley*, 80 U. S. 13 Wall. 72, 83 (20: 485, 486);

St. Louis Smelt. & Ref. Co. v. *Kemp*, 104 U. S. 636, 640 (26: 875, 876);

Shepley v. *Cowan*, 91 U. S. 330, 340 (23: 424, 428);

Moore v. *Robbins*, 96 U. S. 530, 535 (24: 848, 850);

Quimby v. *Conlan*, 104 U. S. 420, 426 (26: 800, 802);

Steel v. *St. Louis Smelt. & Ref. Co.*, 106 U. S. 447, 450 (27: 226, 227);

Lee v. *Johnson*, ~~116~~ 173 U. S. 48, 51 (29: 570, 571);

Wright v. *Roseberry*, 121 U. S. 488, 509 (30: 1039, 1045).

Obviously the courts have no appellate jurisdiction over the decision of the Secretary in approving or disapproving a lease.

In *Louisiana* v. *McAdoo*, 234 U. S. 633, this court discussed the power of the judiciary to review the action of the executive officers empowered to exercise judgment and discretion in the discharge of an official duty and said:

> "There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a *distinct legal interest* in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the

official is sought, is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution. *Interference in such a case would be to interfere with the ordinary functions of government.*"

And, as we shall hereafter show, the many decisions of the courts granting relief where the land department made erroneous decisions as to the law and issued a patent to one party, when under the law and conceded facts the other was entitled to the patent, have no application to this case, nor to the circumstances involved herein.

In *United States* v. *Black*, 128 U. S. 40-52, 32 L. ed. 355, an application was made to the Supreme Court of the District of Columbia for a writ of mandamus directed against Black, as commissioner of pensions, commanding him to issue to the relator a pension certificate for Twenty-five Dollars per month, etc. The relator in April, 1877, applied to the pension commissioner for a pension under the Act of Congress of March 3, 1873, and after the Act of June 16, 1880, he applied for an increase, raising his pension to $72.00 per month. *The commissioner of pensions made a finding of fact, which, under the pension law, clearly entitled the relator to Seventy-two Dollars per month.* Of course his only remedy

was by mandamus. A mandamus never issues if there is any other adequate remedy, and it must be apparent that the relator had no other method or means of presenting his rights, except by the application for writ of mandamus from the court against the pension commissioner. Also, it has been well settled from *Marburry* v. *Madison*, 1 Cranch. 137 down to date, that the courts will not undertake to regulate or control in advance of official action by an executive officer, the discretion of such officer. The courts will not direct any officer clothed with discretion, to decide in a particular manner or for a particular person. But, in this decision in *United States* v. *Black, supra*, the rule goes further and this court held that the courts will not set aside the decision and official action of an executive officer where that officer is clothed with jurisdiction.

Mr. Justice Bradley, speaking for the court, says:

> "Judged by this rule, the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate

power over the commissioner, and no right to review his decision. That decision and his action taken thereon was made and done in the exercise of his official functions. They were by no means ministerial acts.

"The decisions of this court, which have been rendered since the cases referred to, corroborate and confirm all that has been said. The following are the most important, to-wit: *Brashear* v. *Mason*, 47 U. S. How. 92 (12: 357); *United States* v. *Guthrie*, 58 U. S. 17 How. 208 (15: 102); *Commissioner of Patents* v. *Whitely*, 71 U. S. 4 Wall. 522 (18: 355); *Georgia* v. *Stanton*, 73 U. S. 6 Wall. 50 (18: 72); *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 347 (19:62); *U. S. ex rel. McBride* v. *Schurz*, 102 U. S. 378 (26: 167); *Butterworth* v. *Hoe*, 112 U. S. 50 (28: 656)."

In *Decatur* v. *Paulding*, 14 Peters 497, 10 L. ed. 559,568, Chief Justice TANEY, *in affirming* the Circuit Court in refusing a peremptory mandamus, by which it was sought to *set aside* a judgment of the Secretary of the Navy, said:

"If a suit could come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the Act of Congress, in

order to ascertain the rights of the parties in the cause before them. *The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment.* Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

"The case before us illustrates these principles, and shows the difference between *executive* duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the secretary was obliged to determine whether it was proper to revise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled under one only, or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment, in deciding whether the half pay allowed her was to be calculated by the pay proper, or the pay and emoluments of an officer of the commodore's rank. And after all this was done, he must have inquired into the condition of the navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it; and if not money enough, how it was to be apportioned among the parties entitled. A resolution of Congress, requiring the exercise

> of so much judgment and investigation, can with no propriety be said to command a mere ministerial act to be done by the secretary."

If the courts can interfere with the performance of the Secretary's duties, and the exercise of his discretion in approving or disapproving oil leases, untold mischief will follow, and every applicant for a departmental lease whose lease has been disapproved, will at once resort to the courts to set aside the decision of the Secretary, and compel the approval of his lease. With respect to the interference by the courts with the performance of the executive duties of the officers of the government, we call special attention to the remarks of Mr. Chief Justice TANEY in *Decatur* v. *Paulding*, *supra*, wherein the Chief Justice said:

> "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them. Upon the very subject before us, the interposition of the courts might throw the pension fund, and the whole subject of pensions, into the greatest confusion and disorder. It is understood from the Secretary's return to the *mandamus*, that in allowing the half pay, it has always been calculated by the pay proper, and that the rations or emoluments to which the officer was entitled, have never been

brought into the calculation. Suppose the court had deemed the act required by the resolution in question a fit subject for a *mandamus*, and, in expounding it, had determined that the rations and emoluments of the officer were to be considered in calculating the half pay. We can readily imagine the confusion and disorder into which such a decision would throw the whole subject of pensions and half pay, which now forms so large a portion of the annual expenditure of the government, and is distributed among such a multitude of individuals."

In *Keim* v. *United States*, 177 U. S. 290-293, 44 L. ed. 774, reaffirming the doctrine laid down in *Decatur* v. *Paulding*, *supra*, this court said:

"This case comes on appeal from a decree of the court of claims dismissing appellant's petition. 33 Ct. Cl. 174. The findings of that court show that petitioner was on April 17, 1865, honorably discharged from the military service of the United States by reason of disability resulting from injuries received in such service. He passed the civil service examination, and on May 7, 1888, was appointed to a clerkship in the Post Office Department. On March 16, 1893, at his own request and on the certificate of the civil service commission, he was transferred to the Department of the Interior, and assigned to a clerkship in class 1 in the Pension Bureau, with a salary of $1,200 per year. On March 1, 1894, his salary was reduced to $1,000 per annum, at which salary he continued to serve to July 31,

1894, when he was discharged, and has not since been permitted to perform the duties of his clerkship, although ready and willing to do so. The discharge by the Secretary of the Interior was made upon the recommendation from the Commissioner of Pensions: 'The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him. William Lochren, Commissioner'."

Upon this state of facts Mr. Justice BREWER said:

"Upon these facts we are asked to decide whether the courts may supervise the action of the head of a department in discharging one of the clerks therein.

"It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and actions of the various administrative departments of government. Thus, in *Decatur* v. *Paulding*, 14 Pet. 497, 515, 10 L. ed. 559, 568, in which was presented the question of the right of the Circuit Court of the District of Columbia to issue a writ of mandamus to the Secretary of the Navy to perform an executive act not merely ministerial but involving the exercise of judgment, it was said by Chief Justice TANEY:" (As we have quoted same we here omit repeating it.)

In *Johnson* v. *United States*, 7 Wall. 187, 19 L. ed. 189, this court, in speaking of the judgment of the

Secretary of the Treasury in remitting fines and penalties, said:

> "The power intrusted by law to the secretary was *not a judicial one*, but one of mercy, to mitigate the severity of the law. It admitted of no appeal to the court of claims, or to any other court. It was the exercise of his discretion in a matter intrusted to him alone, and from which there could be no appeal." (Italics ours.)

In *American Casualty Insurance and Security Company v. Fuller*, 69 Conn. 448, 25 Am. St. Reports 337, the court had under consideration the application of an insurance company for a writ of mandamus against the insurance commissioner, whereby the insurance company sought to have the court command the insurance commissioner to admit it to do business in the state. The insurance commissioner had denied the plaintiff a license to do business in the state; had gone into the facts surrounding the application and circumstances, and after hearing the company's application, decided the matter, and the company, by the writ of mandamus, sought to appeal therefrom to the courts. It must be here also apparent that the writ of mandamus was the only method by which the company could raise the question. The insurance commissioner was authorized by the law to examine into the methods of business of any company doing any kind or form of insurance business,

and the court held that he was clothed with discretionary power. The court said:

> "Throughout all these sections the authority given to the defendant is administrative, or *quasi* judicial, rather than ministerial."

The court held that whether the insurance commissioner through an error of law denied the application of the plaintiff, was not a question reviewable by the courts. The court said:

> ***"It is admitted that there is no statute or rule of law that in terms makes it the duty of the defendant to admit the plaintiff to do in this state the kinds of business specified in its application.*** **(Italics ours.)**
>
> "If it is his duty so to admit the plaintiff, it is because such duty falls within the ordinary duties of his office; and this must be gathered from the construction of the insurance statutes. The defendant has construed these statutes as requiring, or at least as authorizing him to refuse the plaintiff's application. The plaintiff insists that such construction is wrong. The whole contention of the plaintiff's counsel is, that the statutes of this state respecting insurance, if construed in the light of the policy of this state towards the insurance companies of other states, and in the light of state comity, would make it the duty of the defendant to grant the plaintiff's request; and they say that their interpretation of these statutes is too obviously correct to admit of dispute, and that therefore

the duty which they ask that the defendant should perform is purely a ministerial one. This contention, however, involves a contradiction. The construction of a statute is not a ministerial act; it is the exercise of judgment. If it is the duty of the defendant to admit or not to admit the plaintiff to do business in this state according to the interpretation to be put on the insurance statutes, then the admitting or refusing to admit involves the exercise of discretion and judgment. It is precisely the same kind of a duty which selectmen perform in respect to the admission of electors: *Perry* v. *Reynolds*, 53 Conn. 527; or assessors in respect to the liability of property to taxation: *Goddard* v. *Town of Seymour*, 30 Conn. 394. It is not a purely ministerial act, and a *mandamus* ought not to issue.

"If the court was of the opinion that the defendant's construction of the insurance statutes was an incorrect one, it could not interfere by way of MANDAMUS. That would be to substitute the judgment of the court for the judgment of the officer appointed by law, and would, IN EFFECT, MAKE THE COURT THE INSURANCE COMMISSIONER INSTEAD OF THE DEFENDANT." **(Italics ours.)**

See also,

Gaines v. *Thompson*, 7 Wall. 347, 19 L. ed. 62;

United States v. *Windom*, 137 U. S. 636, 34 L. ed. 812;

United States v. *Ju Toy*, 198 U. S. 262, 49 L. ed. 1040.

In the very nature of the case the judgment of the secretary in approving or disapproving a lease, can neither be controlled in the first instance by the courts, nor, after action by the secretary, reviewed or set aside by the courts.

In 26 Cyc 160, discretion is defined as follows:

> "Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others."

In *United States* v. *Arredondo, et al.*, 6 Peters 729, 8 L. ed. 547, 561, the court said:

> "The validity and legality of an act done by a governor of a conquered province depends on the jurisdiction over the subject matter delegated to him by his instruction from the king and the local laws and usages of the colony, when they have been adopted as the rules for its government. If any jurisdiction is given, and not limited, all acts done in the exercise are legal and valid; if there is discretion conferred, its abuse is a matter *between the governor and his government.*"

In *Marbury* v. *Madison*, 1 Cranch. 138, 2 L. ed. 60, the court, on page 170 of the official edition and on page 70 of the law edition, says:

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

In *Adams* v. *Freeman*, 50 Pac. 135, the Supreme Court of Oklahoma Territory considered a question similar to that here involved.

Plaintiffs instituted an action in equity against the Indian Agent for the Osage Tribe seeking to enjoin the Indian Agent from excluding plaintiffs from the reservation. The court set out the pertinent sections of the Revised Statutes of the United States, and expressly held that the courts have no power to review the decision and discretion of the Commissioner of Indian Affairs under whose orders the Osage Indian Agent acted. In that case the court said:

> "Under the express provisions of the constitution and the laws of congress, we do not consider the question open for discussion as to whether or not it was a wise measure to intrust the discretion in the matter to the commissioner of Indian affairs. It is plainly given by the statute. In order to subvert and declare that it did not exist in this case, we should be compelled to hold either that the commissioner had not given plain and explicit directions to the

agent, the defendant here, for the removal of all unauthorized persons from the reservation, or that, in his judgment, the continuance of the plaintiffs upon the reservation was not detrimental to the peace and welfare of the Indians at the time specified, or that congress had no power to enact the laws which it did, or that the rules and regulations adopted by the commissioner of Indian affairs which were directory of the conduct of the agent under the circumstances were nugatory and void. We cannot take either position, and can see no escape from the conclusions which, beginning with the authority of congress given in the constitution of the United States, and by congress committed to the president and to the commissioner of Indian affairs, and through the directions given by the commissioner of Indian affairs to the agent, made it his plain duty, in obedience to the full discretion reposed in the commissioner, and authorized by the rules and regulations of the department and the express authority thus given, to remove the plaintiffs from the reservation; and this court is not empowered to review the decision and 'discretion' of the commisioner. *U. S.* v. *Crook*, 5 Dill. 453, Fed. Cas. No. 14891; *U. S.* v. *Sturgeon*, 6 Sawy. 29, Fed. Cas. No. 16413.

"It is very strongly urged by the plaintiffs in error that the action of the president in these matters ought to be *amenable to the law of the land, that discretion does not mean arbitrary power, and that between different courses the president must choose that which is legal, and not that which is illegal.* And the argument of

Mr. Caleb Cushing, then attorney general, as suggested in a case in which he was called upon to advise the president as to what his duty was as to allowing certain claims against the Pottawatomie tribe of Indians, stated that discretion was to discover by the law what was right. 6 Ops. Attys. Gen. U. S. 56. *It is true that the president is amenable to the law of the land, and it is fully shown herein that the law of the land gave him discretion in the particular matter now here for consideration, and that the exercise of that discretion cannot be challenged here. There is no appeal from it.* And this can be plainly and fully gathered from the opinion of Mr. Cushing, here cited as authority, since he there declares in the syllabus of the opinion that 'the president may or not, in his discretion, recognize the pecuniary engagements of the tribe of Indians,' and that the president 'will examine into all such contracts, and confirm them according to what appears to be their legality and sufficiency for their consideration and for their relation to the interest of the Indians,' and further, that 'congress has empowered him to consider, in his discretion, whether the payment of the given assignment to third parties is or is not for the aid of the Indians themselves,' and that 'in the present case * * * the question of obligation for good faith is to be judged by the president.' And this matter being one of intercourse with the Indians, when the president, or, through him, the proper executive department, acts, it is solely a matter of discretion of the president, from which there is no appeal. The judgement of the

lower court dismissing the application for the injunction, and refusing it, should be affirmed, and this is accordingly done. All the justices concur, except Bierer, J., who presided at the trial below, and Keaton, J., who was of counsel."

Where public officers are empowered by municipal or legislative acts to let public contracts to the lowest and best, or the lowest and most responsible, bidder, the courts have uniformly held that the duties of the officers involve the exercise of discretion, and that the lowest bid in dollars and cents may be rejected, and a higher bid, if in the opinion of the officers, is the best or the bidder found to be most responsible, may be accepted, and that the action of the officers in accepting such higher bid cannot be reviewed or reversed by the courts even in a suit by a tax payer.

In *Kelly* v. *City of Chicago*, 62 Ill. 280, the court said:

> "This bill in equity was filed by Kelly & Co. to restrain the board of public works and Steel & McMahon from entering into and performing the contract for doing this work, and to compel the board to award the contract to Kelly & Co., on the ground that they were the lowest reliable and responsible bidders; and also that, as tax payers, they are entitled to demand that the contract be awarded to the lowest bidder.

"The bill, so far as it seeks affirmative relief by having the contract awarded to complainants, is in the nature of a mandamus, and should be governed by principles applicable to that form of remedy.

"And it is well settled that, whenever the act sought to have done requires the exercise of discretion, this remedy will not lie. *There must be a clear legal right to the thing sought. The People* v. *The Contracting Board*, 27 N. Y. 378; *Wilson* v. *The Mayor, etc.*, 1 Denio 595; *Hull* v. *Supervisors, etc.*, 19 J. R. 259; *The People* v. *The Canal Board*, 13 Barb. 432; *The People* v. *The Mayor, etc.*, 25 Wend. 680.

"The complainants have merely submitted a proposal to make a certain contract with the board; how do they found upon that a right to have the board make the contract with them?

"The notice for proposals expressly reserved the right to reject any bid.

"The charter did not make it the absolute duty of the board to let the contract to the lowest bidder; it provides that 'all contracts shall be awarded by said board to the lowest reliable and responsible bidder.'

"These qualities of being reliable and responsible, it is obvious, were of the utmost importance in the construction of a work of this magnitude. And the complainants must have been the possessors of these requisites, as well as being the lowest bidders, to make a case of duty on the part of the board to award the contract to them.

"It was for the board to determine whether the complainants were reliable and responsible; it exercised its judgment upon the question, and found they were not so; and for that reason awarded the contract to another bidder.

"This board of public works is a distinct branch of the city government, and the most responsible duties devolve upon it.

"It has the special charge and superintendence of all the public improvements of the city.

"It is the fit tribunal to pass upon the qualifications of contractors—and evidently, under the charter, it is the board of public works who are to be the judges and determine upon the required qualifications of bidders, and no one else.

"*Should the court hear proofs and determine that these complainants were reliable and responsible, and direct the board of public works to award the contract to them, it would exercise the discretion which belongs to the board, which would be unwarranted, under the well settled principles of law, as declared in the authorities above cited, and as against it being a matter of equitable cognizance*, see *Moores* v. *Smedley*, 6 J. Ch. R. 27."

—*Butler* v. *Darst*, 68 W. Va. 493, 38 L. R. A. (N. S.) 653 and long annotations;

State v. *Rickards*, 16 Mont. 145, 50 Am. St. Rep. 476, and long annotations;

State ex rel. Walton v. *Hermann*, 59 N. E. 104 (Ohio);

High on Extraordinary Legal Remedies, Sec. 92;

Merrill on Mandamus, Sec. 117.

Point Two.

Neither public policy nor the Acts of Congress require the Secretary to assign any reasons for his action in approving or disapproving a lease, and neither the parties nor the courts have any right or power to inquire into the mental processes by which the Secretary reached his decision.

The exclusive jurisdiction to consent to the making of an oil and gas mining lease is conferred by Congress upon the Secretary. These full-blood Indians are wards of the Federal Government. And to protect the Indian against his improvidence and lack of business ability, Congress consequently provided that such Indians should not have full power to lease their lands for oil and gas mining purposes. Congress, by Act of May 27, 1908, provided that full-blood allottees may make an oil and gas mining lease,

> "with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, *and not otherwise.*" (Sec. 2, 35 St. L. 312.) (Italics ours.)

The Secretary of the Interior, therefore, while having no authority to initiate a lease, or make a lease in the first instance, was authorized and empowered to approve any lease made by the full-blood Indian. *The secretary's veto or disapproval, was not necessary to invalidate the lease.* No lease became a

valid and enforceable contract until the secretary approved it. And, under the express terms of the lease executed by Eastman Richard to the plaintiff, Anicker, no leasehold estate could begin or vest prior to the approval of the secretary. The preamble in the lease recites that it is made and executed by the parties "under and in pursuance of the provisions of Act of Congress approved May 27, 1908, (35 Stat. L. p. 312)." Then follows the first paragraph, to-wit:

> *1.* "The lessor, for and in consideration of one dollor, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease and let unto the lessee, for the term of ten yars *from the date of the approval hereof by the Secretary of the Interior*, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following tract of land, etc."

The lease was not rendered invalid by the secretary's disapproval. Upon the other hand, its validity depended upon the approval of the secretary. At any rate prior to approval the most the lessee had was an inchoate right which could never mature without the secretary's approval. Every person taking a lease, takes it with knowledge that its valid-

ity is subject to the approval of the secretary, and that the secretary in deciding whether or not he will give his approval, necessarily exercises a discretion and judgement. The secretary acts in an administrative capacity, and his discretion is final and not reviewable by the courts. The courts have no right or power to enquire into the reasons of the secretary.

The secretary may approve or disapprove a lease without giving any reasons whatever for his action. Neither public policy, nor any Act of Congress, nor regulation of the department, requires the secretary to assign or express any reason for his action on a lease. Now if the secretary can approve a lease, or disapprove a lease, without giving any reasons whatever, how can his reasons, when he does give them, affect the validity of his approval? If he gives a reason in writing and states the ground of his decision for approving or disapproving a lease, does the validity of his approval depend upon the correctness of his reasons for approving or disapproving? And, right here lies the vivid line of demarcation between this case and those in which the courts have declared the wrongful patentee of public land a trustee of the title for the party actually under the law entitled to the patent. In the contest over conflicting entries, before the Land Department, the secretary *must* construe and decide the law and not only *must* he decide the law, but he must also decide it correctly.

If, by a clear mistake of law the secretary deprives a party of his *vested right to a patent*, then such party may obtain relief in equity against the wrongful patentee.

In this case the secretary was not required to construe the recording laws, or determine, first, the question of bona fide purchaser, and second, affix, as a ministerial act, his approval to plaintiff's lease if he decided, under the recording laws, plaintiff was a bona fide purchaser.

Suppose in this case the lease executed by the allottee to Anicker, had been the only lease executed by the allottee, and the secretary had declined to approve it because Anicker did not live in Creek county where the land is s i t u a t e d : would that be any grounds for the courts to interfere and assume jurisdiction to approve Anicker's lease? The discretion conferred upon the secretary by Congress, in this matter, was unlimited, and the secretary in exercising his discretion, is alone answerable to his conscience and his oath. Suppose the identical lease taken by Anicker in this case had been the only lease executed by the allottee, and the secretary declined to approve it because Anicker was not an experienced oil operator: could the courts compel the secretary, by mandamus, to approve Anicker's lease? And especially: could the courts take jurisdiction, and by decree, approve Anicker's lease? And further, if the

secretary gives one reason for his action in disapproving a lease, and states no other reasons, and the courts should find that one reason was wrong, because based upon an incorrect construction of the law: could the courts approve Anicker's lease, or accomplish the same thing, by declaring some other lessee trustee for Anicker, *without presuming that the secretary might have had other reasons for disapproving it?* If the secretary gives one reason for his action, and that one reason is wrong, yet the courts have no jurisdiction to set aside his approval, because the secretary might have disapproved the lease for some other reason which would be good, *and how can the court say what the secretary would have done if he had not fallen into an error of law.*

Take this case: Suppose we concede for argument that the secretary construed the recording laws erroneously, the "very most" plaintiff can say is that the secretary's final decision was INFLUENCED thereby. But how can the court find from the record that the secretary but for such error would have approved plaintiff's lease? And yet that is what the court must find before plaintiff can have the semblance of a case.

When a lease is submitted to the secretary for his action, its submission involves an examination of its terms and conditions, an examination into the *personality* of the lessee, and many elements enter into

the decision of the secretary, just like many elements enter into the judgement of an individual when he comes to make any kind of a contract. While the secretary is not a party to the contract, yet he is called upon to judge of its terms and fairness, the adequacy of the consideration, and whether or not it is advantageous to the lessor. The personality of the lessee, financial ability and experience or skill as an oil operater are just as important as any term in the contract or lease.

In *Midland Oil Company* v. *Turner*, 179 Fed. 74-77, the Court of Appeals for the Eighth Circuit, in discussing the assignment of a departmental oil and gas mining lease, said:

> "It is as much a natural right of a person to select those with whom he contracts as it is to determine the character of his engagement and the terms and conditions by which he will be bound."

In *National Bank* v. *Hall*, 101 U. S. 43-51, 25 L. ed. 825, this court said:

> "In making a contract, parties are as important an element as the terms with reference to the subject matter. Mutual assent as to both is alike necessary."

In *Arkansas Valley Smelting Co.* v. *Belden Mining Co.*, 127 U. S. 379, Mr. Justice GRAY said:

> "Everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have a right to the benefit you anticipate from the character, credit and substance of the party with whom you contract'."

The proposed lessee's character, integrity, ability, experience and skill as an operator, are all elements which must be, and should be considered by the secretary in making up his mind as to whether or not he will approve the lease.

In *Cherokee Nation* v. *Hitchcock*, 187 U. S. 295, 47 L. ed. 184, this court had under consideration a suit filed in equity, in the Supreme Court of the District of Columbia, wherein the complainants were the Cherokee Nation and its Principal Chief, against the Secretary of the Interior, as defendant. The Cherokee Nation sought to enjoin the secretary from leasing a part of the domain of the tribe for oil and gas and other mineral purposes. The secretary was acting under the Act of Congress of 1898 authorizing him to lease the tribal lands for mineral purposes (30 Stat. L. 495). Chief Justice WHITE delivered the opinion of the court, and held that the demurrer was properly sustained in the lower court,

> "because of the fact that the matters named in the bill were matters of administration, to which the Act of June 28 was applicable, and they were

> solely cognizable by the executive department of the government."

In *United States ex rel. West* v. *Hitchcock*, 205 U. S. 81, 51 L. ed. 718, the court had under consideration an appeal from a judgement of the District Court of Columbia, denying mandamus to require the Secretary of the Interior to approve the selection by the relator, of an allotment, as an adopted member of the Wichita tribe. By the second article of the agreement with the Wichitas the United States agreed that there should be allotted to each member of the tribe, native and adopted, one hundred and sixty acres out of the lands to be selected by the members, etc. The fourth article of the agreement contains the provisions as to the control of allotments when they

> "shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior."

The relator alleged in his petition that he was a white man married to a Wichita woman and thereby a member of the tribe, and that his adoption was confirmed and recognized in various ways set forth in his petition. The relator moved for a peremptory mandamus to direct the Secretary of the Interior to approve his selection of a one hundred and sixty acre allotment. The secretary answered alleging that he had examined and considered the applica-

tion of the relator, and on July 3rd, 1901, had reached and announced a decision that the relator was not a member of the tribe, and therefore had denied the application for allotment. Mr. Justice Holmes said:

> "It is argued that the answer admits the averments of the petition, as it does not deny them in terms, and that therefore it must be taken that there was no question concerning the relator's membership for the secretary to decide. His identity was not disputed, nor, it is said, the acts of adoption that took place long before the relator applied to have his selection approved, and, therefore, the secretary's duty was merely ministerial, to carry out the mandate of the act. But the admission, at most, is only the admission implied by a plea of estoppel by judgement. In truth it hardly goes so far as that; for when a party says that he is the proper person to decide the question raised, and that he had decided it against the party raising it, he hardly can be said to admit that his decision was wrong.
>
> "The approval of the secretary, required by the agreement, must include, as one of its elements, the recognition of the applicant's right. If a mere outsider were to make a claim, it would have to be rejected by someone, and the secretary is the natural, if not the only, person to do it. No list or authentic determination of the parties entitled is referred to by the agreement, so as to narrow the secretary's duty to identification or questions of descent in case of

subsequent death. The right is conferred upon the members of the bands, but the ascertainment of membership is left wholly at large. *No criteria of adoption are stated.* The secretary must have authority to decide on membership in a doubtful case, and, if he has it in any case, he has it in all. Furthermore, as his decision is not a matter of any particular form, his answer saying that he has decided the case is enough; for even if he has not decided it before, such an answer would announce a decision sufficiently by itself.

"But the answer was not confirmed to a general allegation that the secretary had decided the case. It gave the date of the decision, and the relator, under his plea, put the decision in evidence. It was a letter which seemed to admit that the relator had been adopted by the Indians as a member of their tribe, *but assumed that the adoption must have been approved by the Indian office to be valid, as provided by a regulation of* that department. The relator contends that the validity of the adoption was a matter purely of Indian law or custom, and that the department could not take it under control." (Italics ours.)

And we especially invite the court's attention to the following remarks of Mr. Justice Holmes in the above styled case:

"However, it hardly is necessary to pass upon that point. Although the answer gave the decision a date, that did not open it for consid-

eration. If the secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being right. By alleging that he had denied the application he did not invoke the revision of his reasons by a court, even when he saw fit to add the date. He raised no question of law, but simply stood on his authority and put forward his decision as final. As we have implied, such an answer affirms not merely the past but the present determination of the answering tribunal, and must be assumed to be based on reasons that the respondent deems adequate. *Even if those given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the secretary's grounds. He has not disclosed to the court any statement of those grounds purporting to be exhaustive and complete, and the court cannot make an inquisition into his mental processes to see whether they were correct.* See *De Cambra* v. *Rogers*, 189 U. S. 119, 122, 37 L. ed 734, 735, 23 Sup. Ct. Rep. 519.

"We doubt if Congress meant to open an appeal to the courts in all cases where an applicant is dissatisfied. Of course the promise of the United States that there shall be alloted 160 acres to each member of the Wichita band may be said to confer an *absolute right upon every actual member of the band.* But someone must decide who the members are. We already have expressed the opinion that the primary decision must come from the secretary. There is no indication of an intent to let applicants go further. There are insuperable difficulties in the

way of at least this form of suit, and the Department of the Interior generally has been the custodian of Indian rights."

It is therefore our contention that the mental processes by which the secretary arrived at his decision to approve the defendants' lease, and his decision to disapprove the plaintiff's lease, cannot be inquired into by the courts. If the secretary gives one reason in writing, and that reason be wrong, yet, how can the courts say that the secretary would have otherwise approved the plaintiff's lease and disapproved the defendants' lease?

In cases before the land department involving the rights of a party to a patent, the rights of the claimant are absolutely fixed by the law as applicable to the facts, and where the department fails to award the land and issue a patent to the rightful claimant, the court will review the JUDGMENT of the department, and the power and jurisdiction of the courts do not depend on the department EXPRESSING AN ERRONEOUS OPINION. The absence of a written opinion, or expressed reasons, do not deprive the rightful claimant to relief in the courts. The JUDGMENT of the land department, and not the expressed opinion, is what the courts review. But in this case, if the Secretary had simply disapproved plaintiff's lease and approved defend-

ants', without expressing any reasons, it must be held the courts would have no jurisdiction to inquire into, review or set aside the judgment of the Secretary, that judgment being rendered in the exercise of his official and administrative discretion. Consequently, by what authority can the courts exercise jurisdiction to review and set aside the same judgment of the Secretary because he may have expressed an erroneous reason for his disapproval of plaintiff's lease, when in the absence of any expressed reason this same judgment would be absolutely impregnable to attack?

Point Three.

The only point of law decided by the Department was that the discretion and authority of the Secretary was not controlled or extinguished by the recording laws, nor by the status of a subsequent lessee as a *bona fide* purchaser over a prior lessee. In this holding the Secretary made no mistake of law.

As we will hereafter show, this record discloses that the plaintiff's lease would have been disapproved without any opposition or competition upon the part of the defendants. The United States Indian Superintendent had no jurisdiction to approve or disapprove the lease, but he was the representa-

tive of the Secretary of the Interior on the ground, and the secretary depended upon, and had given general instructions to, the agent to gather the facts and advise him as to the sufficiency of the consideration and the responsibility of the lessee, and such other matters as would ordinarily be considered important to ascertain before deciding to approve or disapprove a lease.

It appears from the opinion of the Indian superintendent that this was a three-cornered fight; that the Eastern Oil Company had a lease on the whole 160-acre allotment, executed on November 29, 1911, but not filed in the office of the Indian superintendent at Muskogee within thirty days as required by the secretary's rules, but filed on January 13th, 1912. That lease was disapproved, because the lessee had not complied with the secretary's rules and regulations, and that matter may be disposed of without further comment, otherwise than by illustration.

It appears, however, that both the defendants and the plaintiff had actual notice of the Eastern Oil Company's lease at the time they acquired their leases.

On April 11th, 1912, the lessor filed a statement (Rec. 44) requesting the secretary to approve the lease to the Eastern Oil Company, notwithstanding the delay in filing the same in the office of the Indian superintendent. On April 19th, 1912, (Rec. 44) as

shown by the superintendent's report, Eastman Richard presented a petition asking that an early hearing be had and that one of the leases be approved by the secretary upon the payment of a reasonable bonus. On April 9th, 1912, the Eastern Oil Company offered a bonus of Eight Hundred Dollars and enclosed to the agent a remittance of Eight Hundred Dollars, and on the 11th of April, the lessor requested the secretary to approve the lease to the Eastern Oil Company upon condition that the Eastern Oil Company pay a greater bonus than that offered by the other lessees, to-wit, the plaintiff and these defendants. Now it clearly appears that up until April 11th, 1912, *neither the plaintiff nor the defendants had offered an adequate bonus, or a bonus of anything like Eight Hundred Dollars,* and in view of the fact that the defendants and the plaintiff both had notice that the Eastern Oil Company had a lease, it seems to be absolutely clear that if the secretary had approved, after the request of the lessor of April 11th, 1912, the Eastern Oil Company's lease, and disapproved the leases of the plaintiff and the defendants, neither of these parties, Anicker nor the defendants, could have any standing whatever in a court of equity, or any other court, against the Eastern Oil Company, and certainly not against one another. But the secretary declined to approve the Eastern Oil Company's lease on the

ground that the company had violated his rules and regulations, and sinned away its chances to favorable consideration by the department.

There was an issue made before the department as to whether or not the plaintiff had actual notice, or actual notice of such facts that put him on inquiry, and charged him with implied notice of the defendants' lease. Eastman Richard testified before the department that he told Anicker that he had leased this land to the Eastern Oil Company, and that he had also leased it to Roy Scales. It appears from the evidence before the department, that Roy Scales was the agent of the defendants, and took this very lease for them on March 20th 1912. While Anicker did not testify before the department that he had no notice of the defendants' lease, yet, he introduced Mr. Motter, his attorney, who testified that he inquired of Eastman, and that Eastman told him the only lease he had executed was the one to the Eastern Oil Company, and upon finding the Eastern Oil Company had not filed its lease in the office of the Indian superintendent, he Motter, concluded that the Eastern Oil Company had no rights. At any rate there was an issue of fact presented to the department as to whether or not Anicker was a *bona fide* purchaser. In the contest before the department Anicker claimed that he filed his lease in the office of the Agency, and put his lease on record in the office of the Regis-

ter of deeds in the county in which the land is situated, prior to the defendants' filing their lease in the office of the Agency, or placing it on record in the county where the land is situated, and further that he was a purchaser of his lease on March 28th, without any actual notice of the defendants' lease. Stripped of the necessity of the secretary's approval, and based exclusively on the private rights of the parties, this presented questions of fact as well as questions of law. The department, however, not considering a finding and decision on this issue as controlling and extinguishing the power and discretion of the secretary, did not decide the question of fact as to whether or not Anicker had actual notice of the defendants' lease, and did not determine the question as to whether or not Anicker was chargeable with notice of the defendants' lease, by virtue of the testimony of Eastman Richard that he told Anicker he had leased the whole allotment to the Eastern Oil Company, and at another time to Roy Scales. Neither did the Indian superintendent, the Indian commissioner, nor the secretary, find that Anicker was entitled to have his lease approved as a matter of right except for the reason that defendants' lease bore a prior date. There is nowhere in either the findings of the Indian superintendent, or the decision of the Secretary of the Interior, a finding of fact, or any statement, that the secretary would approve An-

icker's lease if it were not for the fact that the defendants' lease bore a prior date. All on earth the Indian superintendent held, was that the defendants were entitled to have their lease approved for the reason that they had complied with all the rules and regulations, and had a lease eight days before Anicker got his lease. The Indian superintendent says:

> "The lease in favor of David Gunsburg and Southwestern Petroleum Company is dated March 20, 1912, and filed April 5, 1912, while the lease to William J. Anicker bears date of March 28, 1912, and was filed March 30, 1912. The department has uniformly held in such cases that where a lease is filed, with the papers necessary for completion of the same, within thirty days, that the date of execution is the date from which the priority of the lease is determined." (Record, p. 47.)

Further on the Indian Superintendent says, after some discussion:

> ***"It is also contended that he (meaning Anicker) had no actual notice, and an ATTEMPT has been made to show that the lessor had conveyed the idea to Anicker or his agent that the only lease he had executed, when approached by Anicker, was the lease in favor of the Eastern Oil Co. It will be noted in the testimony that an UNSUCCESSFUL EFFORT was made to secure an admission from Eastman Richard that would corroborate this contention. For the purposes of this case I do not consider it***

necessary to determine AT THIS TIME whether or not the evidence at hand shows that such representations were made by the lessor; even admitting that the lessee was misled by the lessor, the regulations which provide thirty days within which a lease may be filed, if binding upon parties interested in securing leases, should be considered as heretofore, as giving that lease priority which bears a prior date of execution and is filed with the papers required, within the thirty-day period." **(Rec., p. 48.)**

Not only did the Indian superintendent at no time intimate that the approval of Anicker's lease would follow as a matter of course and as a mere ministerial duty, upon a decision of the superintendent and an affimance by the secretary that Anicker had priority and was a *bona fide* purchaser, but the superintendent expressly announces that the secretary may approve or disapprove without regard to priority and that priority could not control the discretion of the secretary.

The Agent further says in his written finding:

> "In my opinion the above rule is supported by the weight of authority and that in the disposition of these leases, or any lease submitted to the Honorable Secretary of the Interior for approval, *he may approve or disapprove.* A contrary construction of the law would deprive the Secretary of the Interior of his *discretion* in the matter, which is clearly granted to him

> by various Acts of Congress affecting leases on lands allotted to citizens of the Five Civilized Tribes. *As a basis for the exercise of his discretion*, the department has adopted certain regulations, the enforcement of which are intended to give all persons fair and equal rights thereunder, and of which regulations prospective lessees must not only take notice, but must assume that the regulations must be enforced against them, and that the department will protect them where they take advantage of any privileges granted thereby, such as the use of the thirty-day filing period." (Rec., p. 50.)

The Indian Superintendent is the local representative of the secretary, and under the special instructions given him by the secretary, it was his duty to investigate the circumstances and the advisability of making the lease, and inquire into the consideration and its sufficiency and adequacy, and inquire into the personality of the proposed lessee.

Section 13 of the rules and regulations in force at the time is as follows:

> "The Indian Agent at Union Agency, or other government officer having the matter in charge or under investigation, may, at any time, either before or after approval of a lease, call for and seek any additional information desired to carry out the purpose of the regulations, and such information shall be furnished within the time specified in the request therefor."

The lease form prescribed by the Secretary, and actually used by both parties to this case, had printed on the back thereof in blank, the following:

"DEPARTMENT OF THE INTERIOR,

United States Indian Service, Union Agency.

Muskogee, Okla., ... 191. . .

The within lease is forwarded to the Commissioner of Indian affairs with recommendation that it be *(disapproved). See my report of even date.*

. . . . . .

United States Indian Superintendent."

Now below this blank form for the United States Indian Superintendent to make his recommendation that the lease be "approved" or "disapproved" we find the following blank for the Commissioner of Indian Affairs to fill out:

"DEPARTMENT OF THE INTERIOR,

Office of Indian Affairs.

Washington, D. C., ... 191. . .

Respectfully submitted to the Secretary of the Interior, with recommendation that it be. . . . . .

. . . . . .

Commissioner."

It has been the uniform practice, and was the practice in this case, for the Indian Superintendent to hear the testimony offered in support of the appli-

cation for the approval of the lease, and make his findings of fact and recommendation to the Secretary, and the blank form for the Superintendent to fill out contains the words "See my report of even date." Nowhere does the Indian Superintendent make any finding of fact that the plaintiff had no actual notice of the defendants' lease, although that was an issue of fact raised by the contention of the parties and presented in the testimony and evidence submitted to the Indian Superintendent. The Indian Superintendent, in referring to the question as to whether or not Anicker was in fact a lessee without notice of the defendants' lease, makes no finding on that issue, but says in his report:

> "For the purposes of this case I do not consider it necessary to determine *at this time* whether or not the evidence at hand shows that such representations were made by the lessor." (Rec. p. 48.)

In the written opinion of the Secretary of the Interior, dated September 24th, 1912, the Secretary also pretermitted making any finding on the issue of fact as to whether or not Anicker was a *bona fide* purchaser and obtained his lease without notice of facts or circumstances putting him on inquiry. Neither is there any finding of fact, by the Indian Superintendent or the Secretary of the Interior, that Anicker is a *proper lessee;* or that Anicker's lease was sup

ported by an adequate consideration; or that Anicker personally was the proper party to whom the Indian should lease the allotment; or that it was to the best interest of the allottee that Anicker's lease be approved. Neither is there any statement, in either the opinion of the Secretary or the findings of the Indian Superintendent, that Anicker's lease would be approved except for the fact that the defendants had a lease prior in date. The Secretary disapproved Anicker's lease in the e x e r c i s e of his discretion, and if we assume that the Secretary disapproved Anicker's lease for the sole and exclusive reason that the defendants had obtained prior thereto, an oil lease on the same land, what power or jurisdiction has the court to revoke the *disapproval* of the Secretary?

Conceding, for the sake of argument, that the Secretary disapproved Anicker's lease for the sole and exclusive reason that the defendants had a prior lease, yet, there is no decision by the Secretary that the defendants had priority under the recording laws. The Secretary made no decision on that law, and did not base his decision on the law, or on the construction and application of the recording laws.

And, in the opinion of the Secretary of the Interior dated December 9th, 1912, (Rec. 53 and 54) on petition of Anicker for re-hearing, the Secretary expressly admits that, under the recording laws, *An-*

icker has the advantage. The opinion of the Secretary on Anicker's petition to re-hear, throws light on the mental processes of the Secretary at the time he disapproved Anicker's lease. Counsel for the plaintiff have fallen into the error of construing the opinion of the Secretary as an interpretation and application of the recording laws, and they insist that the Secretary based his decision in disapproving Anicker's lease on an erroneous construction and application of the recording laws.

An analysis of the Secretary's opinion of September 24, 1912, (Rec. 51), will show that the Secretary clearly asserts his power and discretion and right in the exercise of his judgement to disapprove the plaintiff's lease without regard to the recording laws. The Secretary, in his opinion of September 24th, says:

> "The lease to W. J. Anicker conflicts with that to Gunsburg and others, both covering the same land. Both leases were filed at the agency within thirty days of their execution. The Anicker lease, executed March 28, was filed March 30; the Gunsburg lease, executed March 20, was filed April 5. The rule of practice is that among competing leases, duly filed in compliance with the rule, the lease first executed shall be accepted, *i. e.*, the date of execution governs. Anicker contends that the date of filing ought to govern. In your letter you say, 'It is contended that the leases should have been filed for record

in the proper county in conformity with the laws of the State of Oklahoma, and in view of the fact that the lease in favor of Anicker was so recorded, it should be approved'." (Rec., p 52.)

And, without discussing the facts, the Secretary proceeds further, as follows:

"There seems to be a misapprehension here. There is nothing to show that Anicker's lease was recorded in the office of the County Recorder, either in the way of notation on the lease or testimony in the case. Evidently it was not so recorded, but the contention is that as the Gunsburg lease also was not so recorded, the latter ought not to prevail over a lease (Anicker's) which was filed at the agency. The lengthy discussion of this point in the briefs does not convince me that the *recognized rule of the Department should be changed, or should be waived in this case.* It has been long established and is well understood. It is suited to the conditions in which the oil and gas leasing business is carried on. In very many cases, a considerable time is required, after the signature of a lessor is obtained, for the execution by the lessee, the making of the bond and other papers. *The Secretary in the exercise of the power vested in him by law, has given thirty days for this purpose.* The only inconvenience which may follow the enforcement of the rule, is where some enterprising person in keen competition to secure a promising piece of land, induces the allottee to execute a lease to him, after he

has already leased it to another; and having filed his lease at the agency, is subsequently informed that the lease executed prior to his has been duly filed and takes precedence. For these reasons the lease to W. J. Anicker (No. 22568) has been disapproved.

"The lease to Funk and Riter (No. 22518) and that to Gunsburg and the Southwestern Petroleum Co. (No. 22601) are found to have been properly executed and filed within the time prescribed by the rules, and have been this day approved.

"The disposition of advanced royalties and bonuses recommended by you and the Superintendent is also approved."

After referring to the argument of counsel for Anicker on the subject of priority and the recording laws, the Secretary, as above shown, says:

"The lengthy discussion of this point in the briefs does not convince me that the recognized rule of the Department should be changed, or should be waived in this case. * * * The Secretary in the exercise of the power vested in him by law, has given thirty days for this purpose."

The most that plaintiff's counsel can extract from the Secretary's opinion of September 24th, is that the Secretary treated the question of priority, under the recording laws, as in no way controlling his discretion to disapprove plaintiff's lease, and approve or disapprove defendants' lease. Was this

an error of law? We say not. Under sections 670 and 671 of Mansfield's Digest of Arkansas, if they be in force, and under section 1195 of the Compiled Laws of Oklahoma, 1909, if it be in force, the prior deed or lease is void only as to the subsequent *bona fide* purchaser or lessee, without notice, but is valid against the common vendor or lessor, Eastman Richard, in this case. (See Am. & Eng. Enc. of Law, Vol. 23, p. 478.) When the Secretary disapproved Anicker's lease, even if he were a *bona fide* purchaser, the Secretary thereby brushed aside the only possible obstruction in the way and thereupon had full power to approve defendants' lease because the defendants' lease was binding on the lessor, and, consequently, the Secretary's approval was not a vain or futile act.

Of course, if Anicker had a vested right to the approval of his lease by the Secretary on account of being a bona fide purchaser, then, the recording laws and their application and construction are material, and the Secretary necessarily had to construe and apply the recording laws. But right here lies the fatal defect in the plaintiff's case. The Secretary did not undertake to determine whether or not, under the facts or the recording laws, Anicker was a bona fide purchaser, nor did the Secretary hold, as a matter of law, that under the recording laws relied upon by the plaintiff, the defendants had priority

over Anicker. He simply held that the recording laws could not control his discretion.

Counsel for the plaintiff are mistaken in their statement that in the argument below we contended that the opinion of the Secretary rendered December 9, 1912, on the application to re-hear should not be considered, because the decision of September 24, 1912, was final. We made no such contention. Defendants, in the third paragraph of their answer (Rec., p. 65) quote from the opinion of the Secretary of December 9, 1912, and rely on the Secretary's reasons therein given as precluding any inquiry by the courts into the action of the Secretary. In the third paragraph of our answer we set forth the following portions of the Secretary's final decision of December 9, 1912, to-wit:

> "If there were any advantage in the prior filing of a lease which was entered into and executed after another lease, both having been filed at the agency within the time required by regulation, Anicker would have that advantage. The Act of March 1, 1907 (34 Stat. 1026), makes the filing at Union Agency legal notice. Anicker's lease is stamped as filed at the Agency March 30, 1912. *Until approved by the Secretary, it was not a completed instrument and the fact of its having been recorded in a county office can not estop the Secretary from FINDING THAT ANOTHER LEASE REGULARLY EXECUTED AND FILED IS MORE FOR THE AL-*

LOTTEE'S INTEREST AND BETTER ENTITLED TO APPROVAL." (Rec., p. 54.)

On pages 71 and 72 of opposing counsel's brief in this court will be found an argument and authorities cited in support of the continuing jurisdiction of the Department up to and including the final decision of December 9, 1912, when the plaintiff's petition to re-hear was denied, and we agree that the Department never lost jurisdiction until its final action on December 9, 1912, it being a well-settled practice in the Department to entertain petitions to re-hear, and the actual delivery of leases withheld until the petition to re-hear, if filed within the regulation time, is acted upon.

On page 73 of plaintiff's big brief is the following statement, in which we fully concur:

> "It was perfectly proper for the Secretary to supplement his opinion on the original decision by a supplemental utterance, *which may be looked to, in order to ascertain the real basis of the decision.*"

We accept that proposition as absolutely sound.

Opposing counsel iterate and reiterate throughout their brief, that part of the Secretary's final decision of December 9, 1912, wherein the Secretary said:

> "If there were any advantage in the prior filing of a lease which was entered into and

executed after another lease, both having been filed at the agency within the time required by regulation, *Anicker would have that advantage.*"

We admit the Secretary was correct in that. Using the language of the Secretary: "If there were any advantage in the prior filing, etc. * * * Anicker would have that advantage." What advantage? The advantage of the prior filing. But that lacks a long way of committing the Secretary to the proposition that the advantage obtained by prior filing eliminated his discretion and compelled his approval of the lease first filed. Neither does this statement of the Secretary that "Anicker would have that advantage" amount to a finding of fact that Anicker was a *bona fide* purchaser without notice. That whole question of *fact* as to *bona fides* was expressly pretermitted by the Indian Superintendent, and not considered by the Secretary as a controlling element.

The trouble with plaintiff's case is that he never reached the place where the Secretary's approval had to follow as a matter of law. Anicker did not do, and could not do, anything making the Secretary's approval follow as a ministerial act. At no stage of the proceedings before the Department did plaintiff acquire a vested right to the Secretary's approval. And, unless it be shown that Anicker acquired an antecedent equity calling, as a matter of right, for the Secretary's approval, then he has no

case. Plaintiff bases his whole case on the theory that the Secretary, by a clear mistake of law, deprived him of a vested right to the approval of his lease, whereas, Anicker never had such vested right, and could not acquire it. The Secretary's discretion was continuous, and could not be destroyed or removed by any act upon the part of Anicker, or any other competitive lessee. It must clearly appear that the Secretary committed an error of law depriving plaintiff of fixed vested rights before he can get anywhere in this case.

Plaintiff's counsel, on page 160 of their brief, very kindly quote from *Wallace* v. *Adams*, 143 Fed. 716, where Judge SANBORN said:

> "Nor did this grant to the Dawes Commission and to the Secretary of the Interior of exclusive jurisdiction to determine matters relating to the allotment of land and to issue certificates which are conclusive evidence of the right of the allottee to the land therein described deprive those courts of their j u r i s d i c t i o n in equity, after the C o m m i s s i o n and the Secretary have exercised this power and exhausted their jurisdiction, to determine whether by error of law or through fraud or gross mistake the Commission and the Secretary have failed to allot the land to the party who was *under the law entitled to it and have assigned it to one who had no right to it.*"

In *Marquez* v. *Frisbie*, 101 U. S. 473, 479, 25 L. ed. 801, Mr. Justice MILLER, speaking for the court, said:

> "That principle is that 'The decisions of the officers of the Land Department, made within the scope of their authority, on questions of this kind, are in general conclusive everywhere, except when considered by way of appeal within that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by mistake of the law, given to one man the land which, on the *undisputed facts belonged to another*, to give appropriate relief.' *Moore* v. *Robbins*, 96 U. S. 530, 535 (XXIV, 848, 850); *Shepley* v. *Cowan (supra)*; *Johnson* v. *Towsley (supra)*.
>
> "As we have already said, the argument of counsel is that the bill which was demurred to makes a case of mistake and of fraud and imposition within the meaning of these decisions.
>
> "*1.* Let us inquire first into the alleged mistake of law by the Land Department.
>
> "The language of this court in *Moore* v. *Robbins*, cited above, is that equity will interfere 'When it is *clear* that these officers have, by a mistake of the law, given to one man the

land which, on the undisputed facts, belonged to another.'

"The meaning of this, and the sound principle is, that where it is a mixed question of law and of fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is *conclusive*.

"But if it can be made *entirely plain* to a court of equity that on facts about which there *is no dispute*, or no reasonable doubt, those officers have, by a mistake of the law, *deprived a man of his right*, it will give relief."

Point Four.

Whether the defendants were entitled to the approval of their lease, and whether the Secretary *erroneously and wrongfully approved their lease, are* not questions of any importance; the plaintiff, in order to set up a trust, must affirmatively show an antecedent equity and a vested right to the approval of his lease, and that the Secretary wrongfully, and by clear mistake of law, erroneously disapproved his lease.

Unless the plaintiff can show that prior to the disapproval of his lease, he did such things and took such steps, as rendered the action of the Secretary of the Interior merely ministerial, and conferred on plaintiff an absolute right to the approval of his

lease, then whether the Secretary erroneously approved the defendants' lease is not the question. That he may have given an invalid reason for disapproving plaintiff's lease, is not the question. The burden is on the plaintiff to show that he had a vested right to the approval of his lease, and that the Secretary in disregard of his rights, on account of some clear error of law, or on account of fraud or inadvertence, disapproved the plaintiff's lease.

The plaintiff is absolutely unable to bring himself within the rules of law announced by the courts in cases wherein equity has declared a trust in favor of a plaintiff against a defendant patentee of government lands. In *James* v. *Germania Iron Company*. 107 Fed. 597, Judge SANBORN wrote the first and second paragraphs of the syllabus, as follows:

> "The Land Department of the United States is a *quasi* judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings, and its patents issued thereon, are impervious to collateral attack.
>
> "But a patent or decision of the Land Department is not impregnable to direct attack. The legal title derived from it may be charged with a trust for the benefit of the party *lawfully entitled to it* either on the ground *(1)* that, upon the facts found, conceded, or established without dispute at the final hearing before the Depart-

> ment, its officers fell into a clear error in the construction of the law applicable to the case which caused them to issue the patent to the wrong party, or for the reason *(2)* that through fraud or gross mistake they fell into a misapprehension of the facts proved before them which had the like effect."

It may be entertaining, and certainly profitable, to examine the basis upon which the courts have exercised jurisdiction to review the decisions of the Land Department after that department has decided the case, or the contest, and awarded and issued a patent to the land.

Mr. Justice MILLER, in *Johnson* v. *Towsley*, 80 U. S. 72, 91, 20 L. ed. 485, goes into this question fully.

A close examination of this opinion by Justice MILLER will disclose, without argument, the weakness in the plaintiff's case. Unless the plaintiff had "a perfect right to the" approval of the Secretary, then he cannot set up a trust in some other lease that the Secretary did approve. Mr. Justice MILLER says:

> "So, also, the register and r e c e i v e r, to whom the law primarily confides these duties, often hear the application of a party to enter land as a preemptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Un-

doubtedly, this constitutes a vested right, and it can only be divested according to law. In every such case, where the Land Office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law and, if it has, to give appropriate remedy.

* * * * * * *

"Undoubtedly, there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that *all the matters passed upon by the Land Office are open to review in the courts.* On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud or impositions or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. *But we are not prepared to concede that when in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right, under the sanction of those laws, the courts are without power to give any relief.* And this is precisely what this court decided in the case of *Minnesota* v. *Bachelder*, 1 Wall. 109 (68 U. S. XVII 551), and in the case of *Silver* v. *Ladd*, 7 Wall. 219 (74 U. S. XIX 138).

* * * * * * *

"*We must, therefore, inquire, whether the statute, rightly construed, defeated Towsley's*

otherwise perfect right to the patent, and this inquiry requires consideration of some of the features of our system of land sales."

In *Downs* v. *Hubbard*, 123 U. S. 189, 214, 31 L. ed. 114, Mr. Justice MATTHEWS, speaking for the court, said:

> "*The jurisdiction to determine such questions does not arise in the courts of the United States by virtue of any power of supervision given to them whereby they have a right to control, to correct, to reverse, and to dictate the procedure and action of executive officers within the scope of the duties confided to them by law.* No such power of revision is given, and none such can be exercised. Such a function is not judicial; it is administrative, executive, and political in its nature. The abstract right to interfere in such cases has been uniformly denied by judicial tribunals, as breaking down the distinction so important and well defined in our system between the several, separate and independent branches of the government; and where the character of the interference sought falls within that designation, the application for it has been uniformly denied.
>
> "The case is different in a litigation between parties involving a contest of conflicting claims, where under some known head of jurisdiction definite relief or redress may be conclusively administered in favor of one and against the other party. *In such cases, the right at law or in equity belongs to one or the other of*

the contestants; to which of the two it should be awarded is the *judicial* question involved."

In the contest between plaintiff and defendants as to which lease the Secretary might approve "the right at law or in equity" did not "belong to one or the other of the contestants." The Secretary could have ended the whole controversy by disapproving both, and, as we shall later on under "Point Five" show, both leases here involved would have been disapproved for want of adequacy of consideration, if the parties had not raised their bonus bids.

In *Downs* v. *Hubbard, (supra)*. Mr. Justice MILLER goes on, as follows:

> "But that in the class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct m i s t a k e s, to relieve against frauds and impositions, and, in cases where it is clear that those officers have by mistake of the law given to one man the land which on the *undisputed facts belonged to another*, to give appropriate relief. *Moore* v. *Robbins*, 96 U. S. 530, 535 (24: 848, 850); *Shepley* v. *Cowan*, 91 U. S. 330 (23: 424); *Johnson* v. *Towsley*, 80 U. S. Wall. 72 (20: 485); *Marquez* v. *Frisbie*, 101 U. S. 473 (25: 800); *Vance* v. *Burbank*, 101 U. S. 514 (25: 929); *Quinby* v. *Conlan*, 104 U. S. 420, 425 (26: 800, 802); *White* v. *Cannon*, 73 U. S. 6 Wall. 443 (18: 923); *Silver* v. *Ladd*, 74 U. S. 7 Wall. 219, 228 (19: 138, 141).
>
> "In *St. Louis Smelting Co.* v. *Kemp*, 104

U. S. 636, 647 (26: 875, 879), it was said: 'If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief; and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands'." (Italics ours.)

In *Lee* v. *Johnson*, 115 U. S. 48, 53, 29 L. ed. 571, Mr. Justice FIELD, speaking for the court, said:

> "It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which, *otherwise*, would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains, he would be *entitled* to the patent; it is not enough to show that it should *not* have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought; not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

Certainly the plaintiff could not have done or performed any act vesting in him the absolute right to the approval of his lease. *If a party can do things making right to approval absolute, then the Secretary can have no discretion.* Whether the Secretary would approve or disapprove it, was a matter within the discretion of the Secretary.

In *Baldwin* v. *Keith*, 75 Pac. 1124, the court said:

> "If we were to concede that the defendant in error had no right to the patent to the land in controversy, by what right can the plaintiff in error contend that he is entitled to a patent thereto?"

In *Sparks* v. *Pierce*, 115 U. S. Rep. 408, 413, 29 L. ed. 428, Mr. Justice FIELD said:

> "To entitle a party to relief against a patent of the government, he must show a *better right* to the land than the patentee, such as in *law* should have been respected by the officers of the Land Department, and, being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. *It must affirmatively appear that the claimant was entitled to it*, and that in consequence of erroneous rulings of those officers on the facts existing, it was denied to him."

In *Bohall* v. *Dilla*, 114 U. S. Rep. 47, 51, 29 L. ed. 61, this court said:

"To charge the holder of the legal title to land upon a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show THAT HE HIMSELF WAS ENTITLED to the patent from the government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused him. IT IS NOT SUFFICIENT TO SHOW THAT THERE MAY HAVE BEEN ERROR IN ADJUDGING THE TITLE TO THE PATENTEE. It must appear that by the law properly administered the title should have been awarded to the claimant (citing authorities). It is therefore immaterial for the decision of this case what our judgment may be upon the conclusions of those officers as to the possession of the patentee. It is plain that the defendant (asking cross relief) Bohall did not bring himself within the provisions of the pre-emption laws."

A party must recover in an equitable controversy over entries for lands on the strength of his own title, and not on the weakness of that of his adversary, and must show he was in law entitled to the land.

—*Watts* v. *Lindsey*, 7 Wheat. 158, 5 L. ed. 423;

Quinn v. *Chapman*, 111 U. S. Rep. 445, 28 L. ed. 476;

St. Louis Smelting Co. v. *Kemp*, 104 U. S. 636;

American Mortg. Co. v. *Hopper*, 64 Fed. 553;

Marquez v. *Frisbie*, 101 U. S. 473, 25 L. ed. 800;

Moore v. *Robbins*, 96 U. S. 530, 539, 24 L. ed. 848;

Parker v. *Lynch*, 7 Okla. 631.

Norton v. *Evans*, 82 Fed. 805;

Savage v. *Worshan*, 72 Fed. 601;

Duluth & Iron Range R. Co. v. *Roy*, 173 U. S. 588, 43 L. ed. 820;

Ballinger v. *Frost*, 216 U. S. 240;

Small v. *Rakestraw*, 28 Mont. 413, 104 Am. St. Rep. 691, affirmed 196 U. S. 403;

Sacramento Savings Bank v. *Hynes*, 50 Cal. 195;

Biddle Boggs v. *Merced Mining Co.*, 14 Cal. 279.

The doctrine we insist upon is fully sustained. That is, that the plaintiff has failed to show that he had, by any action or course of conduct upon his part, matured an equity which gave him the vested right to demand the approval of the Secretary of the Interior.

In this case let us propound this question: Did Anicker, by obtaining his lease and filing the same in the Indian Agent's office, and paying Fifty Dollars cash consideration therefor to the lessor, and, we will assume, being a *bona fide* purchaser without

notice of the defendants' lease, "acquire any interest" upon which he could peremptorily demand the approval of the Secretary of the Interior? Did Anicker, by what he claims he did, obtain a vested right to the approval of the Secretary of the Interior? Upon Anicker presenting to the Secretary his lease, and upon complying with all the rules and regulations and assuming that he was in fact and in law a *bona fide* purchaser, did he thereby destroy the discretion of the secretary, and consequently render the approval of the Secretary a mere ministerial act?

Point Five.

Plaintiff not only fails to affirmatively show that he was entitled to the approval of his lease, but the record before the Secretary affirmatively shows that the plaintiff's lease, as taken by him on March 28th, 1912, and filed in the office of the Indian Superintendent at Muskogee, on March 30th, was, independent of all consideration of the defendants' lease, not entitled to approval and would not have been approved.

As announced in Point Four, the question here presented, is not whether the Secretary erroneously or wrongfully approved defendants' lease, but, whether plaintiff has affirmatively shown an antecedent equity and that he was entitled as a matter of law and fact to the Secretary's approval.

The plaintiff must not only show error of law, fraud, imposition, or inadvertence, but, must also show, as said by this court,

> "such a case as will show that he himself was entitled to the patent from the government."

It was the duty of the Indian Superintendent, under the rules and regulations prescribed by the Secretary, to investigate the lessee, and all the circumstances, for the purpose of reporting thereon to the Secretary. The Secretary was not on the ground, and was, consequently, under the necessity of referring a great many matters, especially matters of fact, to the Indian Superintendent, his agent on the ground.

Section 14 of the rules and regulations promulgated on June 20, 1908, is as follows:

> "*14.* Section 10 of the regulations of April 20, 1908, is amended to read as follows:
>
> "Lessees must procure and file with each lease an affidavit of the Indian lessor, made before the District Agent, United States Indian Agent, Union Agency, if possible, or if not, before a Federal Judge, Clerk of the Federal Court, United States Commissioner or County or District Judge, showing that the lease was understood by the lessor, and bonus agreements if any. (See Form D prescribed, which also covers lessee's affidavit of bonus and non-development.)"

Section 10 of the Revised Rules to May 1, 1912, is as follows:

> "*10.* Lessee must procure and file with each lease an affidavit of the Indian lessor, made before a United States Commissioner, Indian Agent, County or District Judge, Federal Judge or Clerk of a Federal Court, showing that lease was understood by the lessor, and what, if any, the bonus agreements are, etc. (See Form D prescribed, which also covers lessee's affidavit of bonus, no development, amended by Sec. 14, Regulations of June 20, 1908, p. 25.) Note: The Superintendent *of Union Agency by Departmental order of July 1, 1907, is required to investigate and report upon the adequacy of bonus paid for each lease.*"

The above said section 10 of the Revised Rules to May 1, 1912, refers to the instructions given by the Secretary to the Indian Superintendent by Departmental order of July 1, 1907. This Departmental order is as follows:

"(Copy)

GAW M. E. S. ClB H3

DEPARTMENT OF THE INTERIOR

I. T. *Office of Indian Affairs.*

Washington, July 1, 1907.

The United States Indian Agent,

Union Agency, Muskogee, Ind. Ter.

SIR: The Office is in receipt of a memorandum from the Acting Secretary of the Interior

saying that there has been brought to his attention several leases covering a tract of land in Glenn Pool, Creek Nation, which leases were made by Ma ha la Adams, Martha Sevier, and Cleveland Grayson, in favor of the Creek Oil & Gas Company; that it appears that the bonus to be paid is only a thousand dollars; and that from this he concludes that the bonus may be inadequate when the fact is considered that many leases in the Glenn Pool have been sold for several thousand dollars bonus. He requests that you be instructed to take special note as to the adequacy of bonuses, taking into account the time at which the leases were executed.

You are requested to comply with the Department's instructions and because of your position in the field you should be more able to form a just conclusion as to the adequacy of bonus at the time the lease was taken than this Office. You will therefore, in transmitting leases state specifically in your report whether you believe the bonus paid or agreed to be paid was adequate at the time the lease was entered into, and in order that the office and the Department may be fully advised, you are enjoined to be particularly careful in this respect in order that no complaints may arise.

Very respectfully,

(Signed) C. F. LARRABEE,

GAW-GH *Acting Commissioner.*

Through the Inspector, for Indian Territory.

I, the officer in charge of the United States Indian Agency, Union Agency, Muskogee, Okla-

homa, and having the care and custody of the records thereof, do hereby certify that the above and foregoing letter is a full, true and correct copy of said letter from the Acting Commissioner, C. F. LABRABEE, as shown by the records of said office.

Dated at Muskogee, Oklahoma, this 19 day of September, 1913.

DANA H. KELSEY,
United States Indian Superintendent.
By R. S. CATE, *Chief Clerk.*"

By this Departmental order of July 1, 1907, the Indian Superintendent was required to investigate and report upon the adequacy of the bonus paid, and in accordance with this order, and the long continued practice in the Department, Honorable DANA H. KELSEY did, on April 12, 1912, address to D. C. Morrison, Oil Inspector, a letter directing said Oil Inspector to

"make a report, in quintriplicate, as to the adequacy of the bonus paid and the bonus value of the land at the time of your investigation."

The superintendent's said letter to the oil inspector is as follows:

"Leases 22293, 22518, 22568, 22601.

Subject: Request investigation as to bonus value of said lands.

April 12, 1912.

Mr. D. C. Morrison, *Oil Inspector*,

Muskogee, Oklahoma.

Sir: There has been filed with this office various oil and gas mining leases executed by Eastman Richards, a Creek citizen, as follows:

No. 22293, in favor of the Eastern Oil Company, dated November 29, 1911, filed January 13, 1912, covering the NE/4 of Sec. 5, T. 17 N., R. 7 E. Bonus $80.00.

No. 22518, in favor of A. L. Funk and O. E. Riter, dated March 20, 1912, filed March 22, 1912, covering the E/2 of NE/4 of Sec. 5, T. 17 N., R. 7 E. Bonus $80.00.

No. 22568, in favor of William J. Anicker, dated March 30, 1912, covering the W/2 of NE/4 of Sec. 5, T. 17 N., R. 7 E. Bonus $400.00.

No. 22601, in favor of David Gunsburg and Southwestern Petroleum Company, dated March 20, 1912, filed April 5, 1912, covering the W/2 of NE/4 of Sec. 5, T. 17 N., R. 12 E. Bonus $80.00.

You will observe that these leases conflict and in order that the office might determine the rights of the respective lessees, it is desired that you make a report, in quintriplicate, as to the adequacy of the bonus paid and the bonus value of the land at the time of your investigation.

Respectfully,

.....,

Acting United States Indian Superintendent."

FGJ-AED.

In accordance therewith, and on May 16, 1912, the oil inspector submitted to the superintendent, the following reply:

"Received Union Agency May 17, 1912, Enclosure To No. 28961

Leases Nos. 22293, 22518, 22568, 22601.

Subject: Report in re adequacy of bonus.

May 16, 1912.

MR. DANA H. KELSEY, *U. S. Indian Supt.*,

Muskogee, Okla.

SIR: Complying with request of office letter of April 12, 1912, for report in re adequacy of bonus on the following oil and gas mining leases executed by Eastman Richards, a Creek Indian, as follows:

No. 22293, in favor of the Eastern Oil Company, dated November 29, 1911, filed January 13, 1912, covering the NE/4 of Sec. 5, T. 17 N., R. 7 E. Bonus $80.00;

No. 22518, in favor of A. L. Funk and O. E. Riter, dated March 20, 1912, filed March 22, 1912, covering the E/2 of NE/4 of Sec. 5, T. 17 N., R. 7 E. Bonus $80.00;

No. 22568, in favor of William J. Anicker, dated March 28, 1912, filed March 30, 1912, covering the W/2 of NE/4 of Sec. 5, T. 17 N., R. 7 E. Bonus $400.00;

No. 22601, in favor of David Gunsburg and Southwestern Petroleum Co., dated March 20, 1912, filed April 5, 1912, covering the W/2 of NE/4 of Sec. 5, T. 17 N., R. 7 E. Bonus $80.00.

I beg to report that I have investigated said matters and find as follows:

That the first well drilled in the vicinity of said land was completed about the middle of January in Sec. 28-18-7. This well was drilled to a depth of 3000 feet. They got what is now known as the 2200 foot sand at the proper depth and after drilling to a depth of 3000 feet, the well was plugged back to the 2200 foot sand and in an effort to shoot the well, a shell of nitroglycerine lodged in the hole at a depth of about 1200 feet and exploded, thus ruining the well. This well was plugged prior to the commencement of the well in 32-18-7.

What is known as the Slick & Jones well in 32-18-7 was commenced January 22, 1912. Oil was struck in this well on or about March 17th or 18th, but this fact was not generally known until March 19th. For a few days before this and up to March 19th this well was reported to be making a large quantity of salt water, when, as a matter of fact, it was making considerable oil. This was just at the top of the sand and there was considerable gas coming with it. About half a screw was run into the sand and the first 24 hours the well was reported to be making more than 200 barrels of oil. This well is now conservatively estimated to be making from 100 to 125 barrels of oil.

On or about February 1st a well was started in Sec. 34-18-7 by C. J. Wrightsman. On March 26th a flow of gas was struck in this well which was estimated to be about 5 million cubic feet per day. The well was left open for a few days, after

which they drilled a little deeper into the sand and the flow of gas was increased to about 12 million cubic feet per day and was spraying considerable oil, variously estimated at from 20 to 50 barrels per day. This well has since been drilled deeper and is now making from 18 to 20 million cubic feet of gas per day, but there is no increase in the amount of oil.

At the time lease No. 22293, in favor of the Eastern Oil Co., dated November 29, 1911, was executed, there had been no developments for oil or gas within several miles of the above land and it was in what was then known as 'wild cat' territory, and the land was worth but a nominal consideration for oil and gas mining purposes at that time. I am of the opinion that the bonus paid ($80.00) for said NE/4 of Sec. 5-17-7 was a fair and adequate bonus consideration for said lease at the time it was taken.

With reference to lease No. 22518 in favor of A. L. Funk and O. E. Riter, dated March 10, 1912, covering the E/2 of the NE/4 of Sec. 5-17-7, and lease No. 22601 in favor of David Gunsburg and the Southwestern Petroleum Co., dated March 20, 1912, covering the W/2 of the NE/4 of Sec. 5-17-7, it was generally known that oil had been struck in said Slick & Jones well in Sec. 32-18-7, the Wrightsman well in Sec. 34-18-7 was drilling and there was considerable activity in the matter of taking leases in the vicinity of said land, and I am of the opinion, in view of all the facts and conditions relative to the above matter, that $80, the bonus consideration paid for each of these leases, was an inadequate bonus consid-

eration on the dates, respectively, that said leases were executed. I am also of the opinion that a fair and adequate bonus consideration for these leases on the dates, respectively, on which they were executed was $600 each, or at the rate of $7.50 per acre.

At the time lease No. 22568 in favor of Wm. J. Anicker, dated March 28, 1912, covering the W/2 of the NE/4 of Sec. 5-17-7 was executed, gas had been struck in the Wrightsman well in Sec. 34-18-7 and leases were worth considerably more in this locality at that time than they were on March 20 or 22nd, 1912. I am therefore of the opinion, taking all the facts and conditions relative to the above matter into consideration, that the bonus of $400 paid for this lease on the date of execution thereof was inadequate, and that a fair and adequate bonus consideration for said lease on said date was $800.

I respectfully recommend that on whatever leases additional bonus consideration is recommended, the lessee be required to pay said additional bonus consideration as a condition precedent to favorable recommendation of the same.

Respectfully,

D. C. Morrison,

U. S. Oil Inspector."

It seems that counsel for Eastman Richard, the lessor, were contending before the Department, that the oil inspector's report as to the adequacy of bonus, did not report a sufficient amount of bonus, and that the lessor was entitled to more.

Thereafter, the oil inspector submitted a supplemental report in a letter to the Indian Superintendent, dated May 28, 1912. Said letter is as follows:

"Received Union Agency May 29, 1912, Enclosure to No. 31522.

Lease Nos. 22293, 22518, 22568, 22601.

Subject: Report in re adequacy of bonus on leases covering allotment of Eastman Richards.

DCM/B May 28, 1912.

Mr. Dana H. Kelsey, *U. S. Indian Supt.*,

Muskogee, Okla.

Sir: Referring to the matter of adequacy of bonus on leases Nos. 22293, 22518, 22568 and 22601, and to statements made by Messrs. Lucas & Tabor, attorneys for Eastman Richards, as to bonuses paid for oil and gas mining leases in the vicinity of said Eastman Richards land, would say that while it is true that higher bonuses were paid for oil and gas mining leases than those suggested by me in my report of May 16, 1912, for the Eastman Richards lease, it is also true that these bonuses were paid at a later date, to-wit, from April 12, 1912, to May 13, 1912, and cover property in which there were no conflicting interests.

On March 20, 1912, the date of lease No. 22518 in favor of A. L. Funk and O. E. Riter, and lease No. 22601 in favor of David Gunsburg and the Southwestern Petroleum Co., but little was known about the Slick and Jones well in section 32-18-7 except that oil had been struck. They

were drilling on the Wrightsman well in 34-18-7, but neither oil nor gas had been struck in the Wrightsman well. On March 26th, however, a small flow of gas was struck in the Wrightsman well. This well was allowed to blow for a few days and this was the condition of this well when the lease to W. J. Anicker was taken, hence an additional bonus of $200 (a total of $800) was placed upon the W. J. Anicker lease, No. 22568. There was also more of a demand for leases on March 28th than there was on March 20th.

Between March 20, 1912, and April 10, 1912, additional drilling was done on both the Slick and Jones well and the Wrightsman well, and by the latter date the Slick & Jones well was reported to be good for 200 barrels of oil per day and the Wrightsman well was making about twelve million cubic feet of gas per day and spraying oil variously estimated at from twenty to fifty barrels per day. This, together with the fact that the strike had been widely advertised, ran bonus values up until the high bonus values referred to by Messrs. Lucas & Tabor were paid.

Up to the present time I have not placed a bonus value on said Eastern Oil Company's lease as of a later date than November 29, 1911, as I have never been requested to do so. There is no doubt, however, but that an oil and gas mining lease covering said land, with no conflicting leases covering the same land, would have been worth from $5000 to $6000 on April 10, 1912.

I am of opinion that, under existing conditions an oil and gas mining lease covering all of said allotment on April 10, 1912, would have

been worth from $3000 to $4000. The fact that there were conflicting interests, however, and that no lease would, in all probability, be approved until the property might be condemned by drilling on adjacent lands, depreciated the bonus value of said lease to a considerable extent. All of these facts were taken into consideration by me when I placed the bonus values thereon in my report of May 16, 1912.

I see no good reason for changing or modifying my report heretofore made, except as herein stated, relative to bonus values on the Eastman Richards allotment.

Respecfully,

D. C. Morrison,

U. S. Oil Inspector."

Upon the superintendent's receipt of the letter of May 16, 1912, from the oil inspector, the Indian superintendent sent the following letter to the defendants:

"Lease No. 22293 et al FHW DCH 5-18-12

Register Enclosure May 12, 1912.

Subject: Conflicting leases of Eastman Richards.

David Gunsburg and Southwestern Petroleum Company,

c/o Roy E. Scales, *Agent*.

Tulsa, Oklahoma.

Sirs: There is enclosed copy of the testimony taken at a hearing at Union Agency, Muskogee, Oklahoma, on May 13, and May 14, 1912,

in the matter of conflicting leases, executed by Eastman Richards as follows:

Lease No.	*Lessee.*
22293	Eastern Oil Company
22518	Funk & Riter
22568	William J. Anicker
22601	Yourselves

You will be allowed ten days from the date upon which this notice is received within which to file such brief or argument as you may feel disposed to present in support of your contention that the lease executed in your favor should be approved.

You are also advised that the Oil Inspector has submitted a report in connection with the case, advising that the bonus of $80.00 paid upon the execution of the lease was, in his opinion, inadequate and that an adequate bonus at that time was at least $600.00.

Remittance in the sum of $520.00 additional bonus for the lease should therefore be made within the time above specified.

If you fail to make the above remittance or respond to this letter within the time above designated, it will be presumed that you refuse to pay the amount of bonus considered adequate by this office and have nothing further to submit in connection with the case, and the opinion of this office with reference to these leases will then be rendered as the facts in the case may seem to warrant. Respectfully,

(Signed) DANA H. KELSEY,

United States Indian Superintendent."

On May 18, 1912, the Indian superintendent sent the following letter to the plaintiff:

"Lease May 18/12 FHW MLG REGISTER.
Subject: Conflicting leases of Eastman Richards.

May 18, 1912.

MR. WILLIAM J. ANICKER,

c/o Roach & Bradley, Attys.,

Muskogee, Oklahoma.

SIRS: There is inclosed copy of the testimony taken at a hearing at Union Agency, Muskogee, Oklahoma, on May 13th and May 14th, 1912, in the matter of conflicting leases, executed by Eastman Richards as follows:

22293	Eastern Oil Co. lessee,
22518	Funk & Riter,
22568	William J. Anicker,
22601	David Gunsburg & Southwestern Petroleum Company.

You will be allowed ten days from the date upon which this notice is received within which to file such brief or argument as you may feel disposed to present in support of your contention that the lease executed in your favor should be approved.

You are also advised that the Oil Inspector has submitted a report in connection with the case, advising that in his opinion the bonus of $50.00 paid upon the execution of the lease was inadequate and that an adequate bonus at that time was $800.00.

Remittance in the sum of $750.00 additional

bonus for the lease should, therefore, be made within the time above specified.

If you fail to make the above remittance or respond to this letter within the time above designated, it will be presumed that you refuse to pay the amount of bonus considered adequate by this office and have nothing further to submit in connection with the case, and the opinion of this office with reference to these leases will then be rendered as the facts in the case seem to warrant.

Respectfully,

(Signed) DANA H. KELSEY,

United States Indian Superintendent."

In response thereto, the plaintiff did, on June 1st, 1912, as shown by the following letter, send to the Indian superintendent, New York draft for $750.00:

"Received Union Agency Jun 1 1912. No. 32052. June 1st 1912.

DANA H. KELSEY, *U. S. Indian Supt.*

Muskogee, Okla.

DEAR SIR: Inclosed please find N. Y. draft for $750.00 which is additional bonus on a certain Oil & Gas lease executed by Eastman Richard in favor of William J. Anicker, which is in the Department for approval or disapproval.

Said bonus to be turned over to Eastman Richard when lease is approved, *otherwise returned.*

Said O & G lease covers the W2 of the NE/4 of 5-17-7.

Very truly yours,

22568 WM. J. ANICKER."

The letter of April 12th, 1912, from the Indian superintendent to the Oil Inspector, directing that the Oil Inspector make a report on the adequacy of the proposed bonus, and the report of the Oil Inspector, the letter from the superintendent of May 18th, 1912, to the plaintiff, and the plaintiff's response of June 1st, 1912, enclosing New York draft for $750.00, were all in the record before the Secretary of the Interior, and for his consideration, at the time he disapproved plaintiff's lease.

It therefore conclusively appears that the bonus offered by the plaintiff was found by the Indian superintendent to be, in fact, inadequate. The Indian superintendent based this finding upon the report of the Oil Inspector. The inadequacy of the bonus was impliedly admitted by the plaintiff in his letter of June 1st, 1912, and by his deposit of the $750.00, and is not now denied.

In other words, it appears that the Indian superintendent and the oil inspector, the representatives of the Secretary on the ground, investigated and reported to the Secretary that the bonus offered by the plaintiff was inadequate, and that the bonus offered

by the defendants was inadequate. Consequently, we have two contesting lessees before the department applying for the approval of their respective leases, based on considerations entirely inadequate, and as a consequence both leases would have been disapproved by the Secretary unless they had offered a greater bonus. The defendants' lease was filed in the office of the Indian Superintendent on April 5th, 1912, and, at that very time the bonus offered by the defendants and by the plaintiff were entirely inadequate, and found to be such by the department. Neither party, at the time the defendants filed their lease in the office of the Indian Superintendent, was entitled to the approval, or even favorable consideration, by the Secretary and it was at that time his official duty to disapprove both leases.

By mere GRACE of the department, the parties were allowed to increase their respective bids.

This is pretty clearly shown in the report of the Indian Superintendent dated July 18, 1912, found in the record from pages 117 to 122, inclusive. The Indian Superintendent (beginning at the bottom of page 121 of the record) said:

> "*That all parties might be on an equal footing as to bonus*, an investigation was made by the oil inspector, and from his report it appears that a reasonable bonus for each lease was as follows:

No. 22293, Eastern Oil Company, 160 acres, Dated November 29, 1911..$ 80.00
No. 22518, A. L. Funk and O. E. Ritter, 80 acres. Dated March 20, 1912 600.00
No. 22568, William J. Anicker, 80 acres, Dated March 28, 1912..... 800.00
No. 22601, David Gunsburg and The Southwestern Petroleum Company, 80 acres..... 600.00

and amounts sufficient to make the bonus *required* in each case were paid into this office, subject to the disposition of the department, except in the case of the lease to the Eastern Oil Company, which bonus had been paid to the lessor direct, but in which case an additional bonus of $800.00 was deposited with this office.

In view of the fact above set out I respectfully recommend that lease No. 22293, in favor of the Eastern Oil Company and No. 22568, in favor of William J. Anicker be disapproved, that two parts of each disapproved lease be returned to this office, that the bond accompanying lease No. 22568 be also returned, for such disposition as the lessee may deem proper, and that R. Kessel, cashier and special disbursing agent for Union Agency, be granted authority to refund to the lessees the advance royalty and bonus tendered in connection with their respective leases, except that the advance royalty in lease No. 22293, to Eastern Oil Company, should be paid to the lessor, for the reason that said lease was not filed within thirty days, in accordance with the regulations. And I further respectfully recommend that leases Nos. 22518, in

favor of A. L. Funk and O. E. Riter, and 22601, in favor of David Gunsburg & The Southwestern Petroleum Company, and the accompanying bonds, which appear to be properly executed and in conformity with the regulations of the Department, be approved.

Respectfully,

(Signed) DANA H. KELSEY."

(See Rec., pp. 121-122.)

[EXPLANATORY NOTE: Exhibit C to plaintiff's amended bill, record pages 42 to 51, inclusive, sets forth report and opinion of the Indian Superintendent. On the same date, however, the Indian Superintendent wrote a letter of transmittal addressed to the Commissioner of Indian Affairs, which defendants introduced as evidence, and is shown in the record from pages 118 to 122, inclusive. The above quotation is from the Indian Superintendent's letter of transmittal, and actually accompanied the leases from the office of the superintendent at Muskogee to the Commissioner of Indian Affairs at Washington.]

The Secretary rarely has time to examine all the testimony, papers and files in a case accompanying the application to approve or disapprove a departmental lease. Necessarily, he must rely upon subordinates, and under his Rules and Regulations the Indian Superintendent is required to investigate the

adequacy of the bonus, and all other matters and collateral circumstances tending to influence the discretion of the Secretary, and report the same to the Commissioner of Indian Affairs, who in turn examines the record and report of the Indian Superintendent, and then writes his own report and transmits the record and superintendent's report to the Secretary, who obviously and necessarily relies upon the statements and findings and recommendations of the Indian Superintendent and Commissioner of Indian Affairs. The Indian Superintendent expressly states in his letter of transmittal setting forth his recommendations, "That all parties might be on an equal footing as to bonus, an investigation was made by the oil inspector, and from his report it appears that a reasonable bonus for each lease was as follows" (Then setting forth $800.00 as a reasonable bonus at the time Anicker took his lease on the 28th of March, and $600.00 as a reasonable bonus at the time defendants obtained their lease on March 20.) And the superintendent further says: "and amounts sufficient to make the bonus *required* in each case were paid into this office, subject to the disposition of the Department, etc."

If Anicker obtained his lease without either actual or constructive notice of the defendants' prior lease, yet, that did not entitle him to favorable consideration under the facts in this case, because the

Indian Superintendent clearly found and expressly reported that the bonus offered by Anicker was inadequate, and also that the bonus offered by defendants was inadequate, and the inference is clear and conclusive THAT IF ANICKER HAD STOOD ON THE STATUS HE ACQUIRED ON MARCH 28, 1912, AND DECLINED TO INCREASE HIS BONUS OFFER, HIS LEASE WOULD HAVE BEEN DISAPPROVED. Neither Anicker nor defendants were in a position to demand of the Secretary favorable consideration, and if they had maintained the status acquired by them at the time they obtained their respective leases, the Secretary would have disapproved both leases. At the time Anicker increased his bonus bid he had actual and constructive notice of defendants' lease. This within itself, granting for the sake of argument every legal contention of the plaintiff, defeats his action, and bars a successful appeal to a court of equity to set aside the Secretary's disapproval of his lease.

Conceding for the sake of argument that the plaintiff was a *bona fide* purchaser under the recording laws and under the facts, and that defendants' lease was null and void as against the plaintiff; assuming for the sake of argument that that was the status of the parties at the time the plaintiff obtained his lease, paid his Fifty Dollars consideration, filed his lease in the office of the Indian Super-

intendent, and placed it on record in the office of the Register of Deeds, the fact that the bonuses offered by the plaintiff and the defendants were entirely inadequate, and so found by the Indian Superintendent, and consequently making it the duty of the Secretary to disapprove both leases, operated to destroy the equity and alleged priority of the plaintiff over the defendants.

The record before the department affirmatively shows that at the time the plaintiff acquired the alleged status of a *bona fide* purchaser, his lease, standing on its own merits and independent of all consideration of the defendants' lease, would have been disapproved, and that being the situation of the plaintiff, it is somewhat difficult to discover just how the plaintiff was in any better condition than the defendants. *On account of the inadequacy of the bonus, both parties were in the same boat, and the question of priority under the recording laws was entirely eliminated.* The plaintiff, under his own theory of this case must show: *first*, that he was a *bona fide* purchaser, *second*, that under the law he was entitled, as a matter of right, to the Secretary's approval of his lease, and *third*, that by clear error of law he was deprived of that to which he was absolutely entitled under the law, to-wit, the Secretary's approval.

Here was a contract submitted to the Secretary for his approval, and the presumption is conclusive, under the facts appearing before the Secretary, that the Secretary would not have approved the lease, it appearing that the consideration was entirely inadequate. This being the situation at the time the plaintiff acquired his alleged status of a *bona fide* purchaser, it is our contention that the subsequent acts of the Indian Superintendent in permitting the plaintiff, and also the defendants, to increase their bonus bids, was a mere matter of *favor and grace*. The Indian Superintendent was not required, by any rule or regulation, to extend this *grace* to the parties. Now, if the Secretary, through the Indian Superintendent, did, as a matter of grace, permit the parties to raise their bonus bids, and thereafter the Secretary disapproved the plaintiff's lease, *how can the plaintiff set up a resulting trust in the grace and favor of the Secretary?* He certainly acquired no rights by his deposit of the Seven-Hundred-Fifty-Dollar additional bonus. At the time he made that deposit he had full notice of the defendants' lease as a matter of fact and as a matter of law, because the defendants' lease was filed in the Indian Superintendent's office on April 5th, and the record shows that the plaintiff had actual notice of the defendants' lease long before May 16th, 1912.

It is not a question of whether or not the defendants were entitled to have their lease approved, but *—was the plaintiff entitled to have his lease approved?*

Unless it affirmatively appears that the plaintiff was entitled, as a matter of law, to the approval of his lease on account of being a *bona fide* purchaser, then it becomes at once immaterial as to what grounds or reasons the Secretary put forth for his disapproval of plaintiff's lease and the approval of defendants' lease. Thus in a contest between two lessees, where the record before the Secretary shows that both leases should be disapproved, it seems clear that the Secretary had full power to enforce his thirty-day rule for filing, and between such lessees, favor the first in time over the first in filing. The courts have uniformly held that a judgment at law obtained through fraud, accident, surprise or mistake, will not be set aside or enjoined in equity, unless it affirmatively appears that the defendant, in the suit at law, had a good defense, and but for the fraud, accident, mistake or surprise, would have defeated the case at law.

Pomeroy's Eq. Jur. Vol. 6, Sec 667, says:

> "It is not the province of equity to correct mere technical wrong. A party seeking its aid must show some substantial injury. It frequently happens that a judgment is obtained by fraud,

accident or surprise, although the same result would be reached if an adversary trial had been had. In such a case the defendant at law is equitably bound to pay the amount of the judgment, and equity will not interfere to relieve him. The fraud, accident, or surprise is, in such a case, a mere technical wrong. Hence, it is laid down that equity will not relieve from judgments in general unless a meritorious defense is shown, so that on a re-examination and re-trial of the case the result would be different. This rule is universal as to judgments obtained merely by fraud, accident or surprise."

In a long annotation to *Rock etc. Ry. Co.* v. *Wells* (61 Ark. 354), 54 Am. St. Rep. 216, Mr. FREEMAN, the learned annotator, in discussing this question, says:

"It is not sufficient, in a suit for relief against a judgment or other decision, to show that it was procured by fraud or was due to surprise, mistake, accident, or s o m e o t h e r ground for the interposition of equity, *if the defendant has suffered no injury from it*, or if the same decision must have resulted had there been a trial of the cause upon the merits. Whatever be the ground for relief, the defendant must, in addition, show that the judgment or decision of which he complains is unjust. If, being a plaintiff, he had no cause of action, or, being a defendant, he had no just ground of defense, but some wrong was done him during the prosecution of the action whereby a judgment was

> entered wrongfully or even fraudulently, he will be left to his legal remedies, if any he has. Therefore, in every bill seeking relief against a judgment, *merit* on the part of the complainant must be shown, otherwise it will not be deemed sufficient to call for the interposition of the extraordinary remedies and powers of equity."

The annotator cites a long list of authorities in support of this well settled rule.

In *Massachusetts Benefit Life Ass'n* v. *Lohmiller*, 74 Fed. Rep. 23-28, the Circuit Court of Appeals of the United States for the Seventh Circuit, said:

> "The rule is invariable that equity will not enjoin a judgment procured through fraud or artifice unless the complainant can a v e r and p r o v e that it had a good d e f e n s e upon the merits."

See also:

High on Inj. Sec. 56;

Ableman v. *Roth*, 12 Wis. 81;

Wilson v. *Shipman*, 33 Am. St. Rep. 660 (Neb.);

Hockaday v. *Jones*, 56 Pac. 1054 (Okla.).

Point Six.

Plaintiff cannot take advantage of any alleged error of law unless such error of law was material, because if plaintiff was not entitled to the approval

of his lease on the whole record before the Department, then a court of equity will give him no relief.

If, on account of the inadequacy of the bonus originally offered by the plaintiff and the defendants, we be correct in our contention put forth under Point Five herein, that by mere grace of the Secretary he allowed each party to increase his bonus offer and thereby acquire a new status, the effect of the recording laws was nullified, and any decision the Secretary made on the question of priority under the recording laws was wholly immaterial. Further, if the record before the Secretary shows as a fact that the plaintiff was not a *bona fide* purchaser, he was not injured by any alleged error of law the Secretary made in regard to the recording acts, such alleged error being wholly immaterial. *A wrong reason for a right decision is never ground for reversal.*

This court in *Hill* v. *Reynolds*, 242 U. S. 362, said:

> "The chief contention of the plaintiffs is that the Secretary of the Interior misconstrued the law applicable to the facts conceded and proved and that this resulted in the issue of patents to one set of claimants when the other set was entitled to them. Under a familiar rule, if this were true, the plaintiffs would be entitled to the relief sought. *Ross* v. *Stewart*, 227 U. S. 530, 535. But was there any *material* mis-

construction of the law by the Secretary? We say *material misconstruction, because, if his decision was otherwise right, its force was not lessened by anything he may have said concerning what was not material at the time.*"

Point Seven.

The evidence before the Interior Department affirmatively shows that the plaintiff, Anicker, was not in fact a *bona fide* purchaser of the lease executed to him.

Plaintiff contends that we cannot raise this question, nor go into the evidence before the department.

He says this point does not involve a federal question, and that the defendants, having removed the case to the federal court on the ground that the plaintiff's case necessarily involves a federal question, are estopped to rely upon any point other than one involving a federal question. Plaintiff has arrogantly insisted throughout this whole case that he has stated *the* case, *the* whole case, and nothing but *the* case, in his pleading, and that the only alternative submitted to the defendants is to confess judgment, or file a motion to dismiss on the ground that the plaintiff's bill does not state a cause of action. Plaintiff's amended petition alleges that the department found as a fact that he was a *bona fide* purchaser, and defendants denied this in their answer.

(See Rec., middle of page 63.) Defendants specifically plead in their answer (Rec., p. 64) that the evidence before the department conclusively showed that Anicker was not a *bona fide* purchaser in fact.

Plaintiff's counsel were determined if possible, to have this case tried on their bill, and we were determined, if possible, to have the whole case submitted to the court and decided on the entire record, so when the cause reached this court on appeal, it may be here tried *de novo*, and finally disposed of without further trial in the lower court.

Rule 29 of the Federal Equity Rules expressly provides that the defendants may raise, either by motion to dismiss, or in the answer, all questions of law arising upon the face of the bill and that the court may, in his discretion, hear and dispose of the law points presented by the answer preceding final hearing. Thus, the trial court may reserve action upon the law points raised by the answer, and hear the whole case on the merits.

The plaintiff does not allege in his amended bill that he is in fact a *bona fide* purchaser, and did not testify before the department that he bought the lease without actual notice, or circumstances putting him on notice, and, neither did he testify or offer to testify on the trial of this case in the District Court.

If the record before the department shows that plaintiff was not in fact a *bona fide* purchaser, his

whole case is bound to fall, because it would be monstrous to give him this lease on a finding that the Secretary committed some error of law against him, when in fact, in equity and good conscience, he did not present a meritorious case to the Secretary.

Courts are made to administer justice and not to umpire a fight between opposing counsel.

On the trial we offered in support of our answer a certified transcript of the entire record before the department, for the purpose of showing *(1st)* that plaintiff was not in fact a *bona fide* purchaser, and *(2nd)* that the Secretary made no such finding, expressly or inferentially. Plaintiff's counsel objected, and pending a ruling on the objection, we offered an amendment to our answer, setting out as an exhibit thereto all the testimony before the department, and alleged in the proposed amendment that if the Secretary found the plaintiff was in fact a *bona fide* purchaser, his finding of fact was *not supported by any evidence*, but that the record before the Secretary affirmatively showed that plaintiff was not a *bona fide* purchaser in fact. They say we cannot raise this point because it does not involve a federal question. We submit in reply the two following points:

A.

The court cannot consider the question as to whether or not the plaintiff was a *bona fide* pur-

chaser in fact, or shown by the record before the department to be such purchaser, until the court *first* decides that it has jurisdiction to review the discretionary action of the Secretary. Our answer challenges the jurisdiction of the courts and denies that the bill presents a justiciable issue. All these questions are preliminary and are essentially federal.

If the courts have authority to go into the action of the Secretary, and review it, then the court must go into the whole record before the Secretary, and try the case *de novo*.

Plaintiff's counsel contend that the courts must simply go into that part of the proceeding before the Secretary which they choose and elect, and pick out, as suitable for their purpose. We say the court should not review any of the proceedings before the department, but that *if* the court does go into those matters, then it must go into the *whole record* before the department, and ascertain whether or not the *plaintiff presented a case to the department* which demanded the Secretary's approval. If we be correct that the record before the department affirmatively shows that plaintiff was not a *bona fide* purchaser, would it not be monstrous to take this lease away from defendants and give it to the plaintiff on a finding of the court that the Secretary made an error of law, when the record before the Secretary shows that if he had correctly decided the facts it

would have been unnecessary for him to have considered the recording laws?

B.

Plaintiff's case, stated in his bill, essentially involves federal questions, and the defendants are not estopped to rely upon a non-federal defense. Whether the cause was removable to the federal court had to be determined from an examination of the plaintiff's bill, and neither the answer nor allegations in the bill as to *what the defense would be*, can be looked to. Did the bill on its face state a federad question?

—*Shulthis* v. *McDougal*, 225 U. S. 561.

If the cause was properly removed to the federal court, the federal court obtained jurisdiction, "and having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

—*Siler* v. *L. & N. R. R. Co.*, 213 U. S. 191;

Ohio Tax Cases, 232 U. S. 576;

Independent School District v. *Rew*, 111 Fed. 1 (8 Cir. Ct. Ap.);

Evans v. *Durango Land & Coal Co.*, 80 Fed. 433 (8 Cir. Ct. Ap.).

Besides, plaintiff's bill shows proper diversity of citizenship, and although the case was not removed on that ground, yet, the federal court having jurisdiction on that ground will retain jurisdiction.

—*Bryant Bros. Co.* v. *Robinson*, 149 Fed. 321 (5 Cir. Ct. Ap.).

On page 83 of appellant's brief it is said:

> "Defendants cannot now change the theory of the case as presented to and passed on by the department so as to raise new issues."

The defendants have never sought to change the issues before the department, and are willing to stand on them in this court, and on the record before the department, but the trouble is that the plaintiff has been wasting energy ever since this law suit started in a strenuous effort to keep out of the court the record made in the department.

On page 80 of appellant's brief it is stated:

> "Those officials all declare they decided the case in Gunsburg's favor and against Anicker upon the law question. It is therefore inconsistent with their language to impute to them the decision on the question of fact against Anicker."

The Secretary did not decide such question of law—he simply held that his discretion was not controlled or eliminated or destroyed by the recording

laws, and that he could approve the first lease and disapprove the second lease, when he found that the first lease was for the best interest of the Indian, and there can be no doubt about the correctness of that holding. The plaintiff's whole case is based upon the *presumption* that the Secretary found as a fact that he was a *bona fide* purchaser. Plaintiff imputes to the Secretary that finding. We say that question was expressly pretermitted, and the Indian Superintendent expressly declined to pass on that question of fact. (Rec. p. 48.) *If the court should impute to the Secretary a finding of fact that Anicker was a bona fide purchaser, then the defendants desire to have the court examine the record before the department in order to refute that presumption.*

In *Howe* v. *Parker*, 190 Fed. 738, Judge SANBORN speaking for the court of appeals held that "Whether or not there is any evidence to sustain a charge, a claim, or a finding of fact in a controversy before the Land Department over the title to the public land is a question of law, and an error in the decision of that question which results in the issue of a patent to the wrong party is remediable in equity."

To the same effect see:

Payne v. *Foster*, 9 Okla. 214;
Harnage v. *Martin*, 40 Okla. 341;
Jordan v. *Smith*, 12 Okla. 703.

In *Florida East Coal Railway Company* v. *United States*, 234 U. S. 167, this court held that a finding of fact made by the Interstate Commerce Commission concerning a matter within the scope of its jurisdiction will be set aside by the courts where not supported by *any* evidence.

The evidence submitted to the department shows the following facts:

That Roy E. Scales was in the employ of defendants on March 20, 1912; that he represented them in obtaining the lease on the west eighty (80) acres from the Indian; that the lease was executed in the office of Butte, Boone & Lattimore, attorneys at Muskogee; that Roy E. Scales was present and conducted the contract on the part of the defendants, and went with the Indian to the office of the United States Indian Superintendent at Muskogee where the lease was explained to the Indian lessor, by Mr. Kremer, the clerk of Mr. Kelsey, Indian Superintendent.

Further, the evidence shows that on March 28th plaintiff was told by the Indian that he had, prior thereto, leased the land to Roy Scales; the Indian lessor testifies to this, and also testifies that he told plaintiff's agent, Robert Fish, prior to the execution of the lease to plaintiff, that he had leased the land to Roy Scales.

Opposing counsel, on pages 112 and 113 of their brief, claim that it is fair to infer that Roy Scales, having at one time been the agent of the Eastern Oil Company, obtained the lease for the Eastern Oil Company on this land in controversy, and that plaintiff had a right to infer from the statement of the Indian that he had leased the land to Roy Scales, that he referred to the lease of the Eastern Oil Company. That argument is unfair, and absolutely refuted by the evidence. In the first place Scales was not the agent of the Eastern Oil Company in obtaining the Eastern Oil Company's lease on this land. Scales acting for the Eastern Oil Company did obtain a lease from the Indian on other land, and he so testified. But suppose Scales did obtain the lease for the Eastern Oil Company, there is no evidence whatever that plaintiff knew at the time he obtained his lease that Scales had ever been the agent of the Eastern Oil Company, and, therefore, plaintiff could not infer that the Indian referred to the Eastern Oil Company lease when he stated to plaintiff that he had leased this land to Roy Scales.

The evidence shows that Robert Fish was the agent of plaintiff, and as such representative, brought Eastman Richard to see him. Neither Anicker nor Robert Fish, either by affidavit or oral testimony, at any time, denied this testimony of Eastman Rich-

ard. Eastman Richard says in his testimony before the department:

"After I found or was told by Arthur (Arthur Rayburn, the agent of the Eastern Oil Company) the Secretary of the Interior had not approved the lease (meaning the lease to the Eastern Oil Company), there was two fellows came to me, those are the fellows standing behind me (witness points to A. L. Funk and Roy E. Scales), and Sam Poke, Eastman's father. These people wanted to see something about the land and I informed them that since the Secretary of the Interior had disapproved of the lease that I really didn't know as to the regulations governing such, and they came on to Muskogee to sign up some papers for the oil and gas lease. We prepared the papers and went back home. And after that time we had prepared the papers about a week or some time later after we had left here (referring to Muskogee), Robert Fish came to me and wanted some papers signed up.

Q. Who for? A. Some one by the name of Anicker wanted to lease the land for oil and gas. I told Robert that I had already leased the land and signed the papers, and he insisted that we go and informed me that I wouldn't be out a cent. He said, I will pay your board and lodging, and we came on over at that time and went to the court house. We found he was not there but his stenographer, or clerk, was in; he came in later. He said, you are here, are you? I said, yes. And he talked to me about the land; we

talked over the matter and I told him I had already made a lease; Robert Fish was by the side of me and we didn't do very much that day but the next morning before we prepared the papers I informed him that I had already leased the land to one Roy Scales; there was two fellows but I forgot their names (witness points to Mr. Funk as being one of the men). They went ahead and prepared the papers and I was going to be appointed guardian over some children and this party wanted the land belonging to these minor children; he wanted the children's land; *I was not yet appointed guardian*, and I told them there might be some possibility of making some arrangements about my land, and I went on and told him I had signed some papers and I went on and told them I didn't care about leasing, or I simply told them to let the matter of leasing my land lay low, just wait until later. I said I would look into the situation and Robert Fish and I went in there and the man went out and came back later, and he said it was all right, but I didn't know just what he wanted.

Q. Who was that? A. Mr. Anicker. And he fixed up the papers and I didn't know just how he prepared them or whether Robert and I were in his office. They took me into a side room, side room in an adjoining office, and Robert Fish was in the office. I went in the office, I went in the other room and signed the papers, but as to how he looked into the situation I don't know; and he said, I have got everything ready now and want you to sign the papers.

Q. Who was that? A. Mr. Anicker. That

fellow told me to practice up writing my signature.

Q. Which fellow? A. Mr. Motter."

Witness further testifies that they went back to the office of the attorney, and that Anicker paid him $50.00 and promised to pay him $400.00; that is, $350.00 more, and that he and Robert Fish aimed to go back on the next train, but Robert said that he had not gotten his pay, and had to stay over; witness told Robert he would go on; that he didn't like to stay by himself.

"Q. Did you tell Mr. Anicker you wanted to make a lease on eighty acres you had not leased? A. I told him I had it all leased.

Q. Did you tell Mr. Anicker you didn't think you could lease that because you had leased before? A. I told him I had leased, and he said he would look into it."

Furthermore, the witness was asked:

"Q. When you gave your name to Anicker, you advised him you had leased 160 acres to Scales? A. I told him that that land was already leased. Robert Fish heard me."

Furthermore, the witness was asked this question:

"Q. Did you tell Mr. Anicker that there was any other lease on the west eighty than the Eastern Oil Company lease; did you tell him

that? A. I told him I had leased to these two fellows, Funk and Scales.

Q. Did you mention Mr. Scales' name to Mr. Anicker at all? A. Told them I had leased to Scales. Didn't know the other fellow, but I did know Scales.

Q. Did you tell them that you had leased the whole 160 to Scales? A. I just told them I had leased the land.

Q. Did you mention Scales' name? A. Yes, sir. I named over Scales. I don't know any one but Roy Scales."

Plaintiff did introduce before the department his attorney, E. C. Motter, who testified that he inquired very closely from Eastman Richard as to what leases he had made prior thereto, and that Eastman Richard told him he had leased the land to the Eastern Oil Company. Whereupon, he, Motter, investigated the records, first inquiring at the office of the Indian Superintendent at Muskogee, and discovered that the lease to the Eastern Oil Company had been filed in the Indian Superintendent's office after the expiration of thirty days, the time allowed by the Secretary's rules in which to file a lease after its execution.

Motter testifies as follows:

"Q What was the conversation? A. My recollection is that I quizzed Eastman about the execution of leases to ascertain his understand-

ing, and I asked him whether he had executed a lease covering this land before, and he replied he had.

Q. To whom? A. He replied to the Eastern Oil Company."

Motter says that after investigating and finding the Eastern Oil Company's lease had been filed after the expiration of the thirty days allowed by the Secretary's rules, he advised Anicker to take the lease from Eastman Richard on the west eighty, on the theory that the Eastern Oil Company had sinned away its rights to insist on the approval of its lease. Motter also says that H. Van Smith, J. B. Furry, Robert A. Zebold and Blanche Ashton were present in his office at the time he had the conversation with Eastman Richard and learned of the prior execution by Eastman of the lease to the Eastern Oil Company. H. Van Smith is the only one of the other parties present in Motter's office who was called as a witness. Van Smith, however, is asked no question pertaining to the conversation occurring in Motter's office at the time the lease was executed by Eastman Richard to the plaintiff, but is introduced as a witness in reference to an affidavit made by Eastman Richard at the instance of Motter, Van Smith and Robert Fish, on the 12th day of April, 1912. This affidavit is as follows:

"AFFIDAVIT.

State of Oklahoma, McIntosh County—ss.

Personally appeared before me, L. C. Clark, a notary public in and for said county and state, Eastman Richard, of lawful age, who being first duly sworn by me, alleges and states as follows:

That heretofore, to-wit, on the 29th day of November, 1911, I executed an oil and gas lease in favor of the Eastern Oil Company, covering my allotment in the Creek Nation, described as the northeast quarter of section five (5), township seventeen (17) north, range seven (7) east, for which I received a bonus in the sum of Eighty ($80.00) Dollars; that on the 20th day of March, 1912, I executed an oil and gas lease in favor of A. L. Funk and O. E. Riter, covering the east half of the northeast quarter of section five (5), township seventeen (17) north, range seven (7) east, being the east 80 acres of my said allotment in the Creek Nation; that on the 29th day of March, 1912, I executed an oil and gas lease in favor of William J. Anicker, covering the west half of the northeast quarter of section five (5), township seventeen (17) north, range seven (7) east, being the west 80 acres of my said allotment in the Creek Nation; that I received as a bonus for the execution of said oil and gas lease to said William J. Anicker the sum of Fifty ($50.00) Dollars, and with the further agreement that I would receive from the said William J. Anicker an additional sum of Three Hundred and Fifty ($350.00) Dollars upon approval of said lease by the Secretary of the Interior.

I further state that all of said leases, to-wit, that to the Eastern Oil Company, that to A. L. Funk and O. E. Riter, and that to William J. Anicker were executed by me in good faith and for the consideration above mentioned.

That on the 29th day of March, 1912, I executed a declaration before Robert A. Zebold, a notary public in and for Muskogee County, State of Oklahoma, with reference to the execution of said lease, and in which I requested the cancellation of the lease executed by me in favor of the Eastern Oil Company, for the reason that said Eastern Oil Company had failed to file its lease for approval within the time limit of thirty days, as required by the rules and regulations prescribed by the Secretary of the Interior for the approval of oil and gas leases.

I am informed that since the execution of the aforementioned oil and gas lease in favor of William J. Anicker, and since the same was filed by him in the office of the United States Indian Superintendent at Muskogee, Oklahoma, a lease purporting to have been executed by me in favor of David Gunsburg and Southwestern Petroleum Company, covering the west half of the northeast quarter of section five (5), township seventeen (17) north, range seven (7) east, has been filed with the United States Indian Superintendent at Muskogee, Oklahoma, for approval by the Secretary of the Interior. That I am also informed that said lease was executed on the same day as the lease executed by me in favor of A. L. Funk and O. E. Riter, to-wit, the 20th day of March, 1912, and that both leases

appear to have been acknowledged before the same notary public, and their execution witnessed by the same witnesses.

I now deny the execution of any oil and gas lease by me in favor of David Gunsburg and Southwestern Petroleum Company, and state that if my signature is affixed to any such lease, that the same was secured from me by false and fraudulent representations, and that if I signed such a lease and acknowledged the same before a notary public, as I am informed that I did, that my signature thereto and acknowledgment were procured by false and fraudulent representations. That I believed at the time of the execution of the lease to A. L. Funk and O. E. Riter that I was leasing only the east 80 acres of my allotment, and that I did not intend, nor did I understand, that I was signing a lease to any other of my lands.

I further state that I received no consideration from the said David Gunsburg and Southwestern Petroleum Company, nor from any person for them any consideration whatsoever for the execution of a lease on the west 80 acres of my said allotment.

I desire to state further that the lease executed by me in favor of William J. Anicker was executed in good faith in all respects, and for the consideration above set forth, and that at the time of the execution of said lease I believed and so stated to the said William J. Anicker and in the presence of other witnesses, that I had not executed any lease in favor of any person covering the west 80 acres of my said

allotment, except the lease executed by me in favor of the Eastern Oil Company, covering my entire allotment.

I, therefore, request that the lease to the Eastern Oil Company be disapproved, for the reason that the same was not filed within the time required by the rules and regulations of the Secretary of the Interior for the approval of such leases, and that the purported lease to David Gunsburg and Southwestern Petroleum Company be disapproved, for the reason that if the same appears to have been executed and acknowledged by me, and if the same was so executed and acknowledged by me, that my signature thereto was procured by false and fraudulent representations, and that I believed I was only executing a lease covering the east 80 acres of my allotment, which lease was executed in favor of A. L. Funk and O. E. Riter.

EASTMAN RICHARD.

Witnesses: H. Van Smith, Robert Fish.

Subscribed and sworn to before me, a notary public in and for said county and state, this 12th day of April, 1912. L. C. Clark,
(Seal) Notary Public.
My commission expires *January 4, 1914.*"

Motter testified that he saw Eastman Richard in Eufaula on April 12th, 1912. Motter says:

"I took and prepared an affidavit and took it to Eastman to have him execute it.

Q. What did you base your statements on

in the affidavit? A. I prepared the affidavit from my recollection of statements made to me.

Q. Was that the affidavit which I hand you? (Hands the witness an affidavit.) [Exhibit A.] A. It is.

Q. Where was that signed, and by whom? A. That was signed in the office, abstract office, of John C. Slate."

Motter then proceeds to testify that the affidavit was read over to Eastman Richard in English, and was read over and explained to him by Robert Fish in Creek.

There must be some mistake about this affidavit somewhere.

Motter testifies that he prepared the affidavit in Muskogee before he went to Eastman, and that "I prepared the affidavit from my recollection of statements made to me." Referring to the affidavit, the court will note that the canned goods prepared for Eastman (being the affidavit), contains the following statement:

"I now deny the execution of any oil and gas lease by me in favor of David Gunsburg and Southwestern Petroleum Company, and state that if my signature is affixed to any such lease, that the same was secured from me by false and fraudulent representations, and that if I signed such a lease and acknowledged the same before a notary public, as I am informed

that I did, that my signature thereto and acknowledgment were procured by false and fraudulent representations. That I believed at the time of the execution of the lease to A. L. Funk and O. E. R'ter that I was leasing only the east 80 acres of my allotment, and that I did not intend, nor did I understand, that I was signing a lease to any other of my lands."

Yet, the testimony before the department shows the utmost fair dealing upon the part of these defendants. Roy Scales was their agent obtaining the lease; took Eastman Richard to the office of the United States Indian Superintendent, and there in that office, Mr. Kremer, the secretary of the Indian Superintendent, went over the lease and fully explained it to Eastman Richard, and took his acknowledgment to the same.

Passing over the criticism which may be meted out on account of the obtaining of this affidavit on the 12th of April, we find that Van Smith was present at the time the Anicker lease was executed in Motter's office on the 28th day of March, 1912, and by some strange coincidence he appears on the scene in Eufaula on April 12th. Van Smith's testimony discloses the fact that he was in Eufaula as the accredited representative of Anicker. He testifies that Robert Fish was in the employ of Anicker, and that he, Smith, paid Robert Fish there at Eufaula, for

Anicker, the sum of $20.00. This appears to be rather a large sum of money for any honest service Robert Fish might have rendered in merely interpreting an affidavit to Eastman Richard. Boiled down, briefly, the facts are, therefore, these:

First. Roy Scales was the agent of the defendants, Gunsburg and Southwestern Petroleum Company.

Second. As their agent, he negotiated the lease executed by Eastman Richard to the defendants on March 20th.

Third. Eastman Richard testifies positively that prior to executing the lease to Anicker on March 28th, he told Anicker that he had leased this land to Roy Scales.

Fourth. Eastman Richard also testifies positively that Robert Fish brought him to see Anicker, and that he told Robert Fish that he had leased this land to Roy Scales.

Fifth. The testimony of Eastman Richard and H. Van Smith shows that Robert Fish was the agent of Anicker in obtaining the lease from Eastman Richard.

Sixth. The record before the department shows that neither Anicker nor Robert Fish took the witness stand, or in any way denied or controverted or contradicted these facts.

"Failure of the purchaser to testify as to his want of notice warrants an inference unfavorable to him."

—13 Enc. of Evidence, page 905.

Also:

"Notice acquired by an agent is equivalent to notice to the principal, provided it was acquired during the continuance of the agency."

—13 Enc. of Evidence, page 908.

This being true, in contemplation of law, Scales being the agent of the defendants, Anicker had actual notice that the defendants had a lease on this land. If Anicker had inquired of Scales, he would have instantly ascertained that the defendants had a lease on this west eighty acres. Anicker also is chargeable with notice through his agent, Robert Fish.

We are not talking about constructive notice. The conceded facts, the uncontradicted evidence before the department, charged Anicker with implied actual notice. Actual notice has been confused with constructive notice where actual notice has been *implied*, or presumed, as a matter of fact. In a very few words, Wade on Notice, draws the proper distinction:

"Constructive notice is thus a conclusive presumption or a presumption of law, while implied notice is a presumption of fact. If this distinction were carefully preserved by writers upon this subject, it would enable us to escape

a good deal of confusion in regard to the subject of notice."

—Wade on Notice, Secs. 39 and 40:

Pomeroy's Equity Jurisprudence, Secs. 592 to 595.

Wade on Notice, Sec. 42, says:

"When notice depends upon an inference of fact, it is where the party to be charged might have gained knowledge by the exercise of due diligence. When it depends upon an inference of law, he will be charged, though actual knowledge was utterly beyond his reach. The inference of fact may be overcome, or qualified by other facts. The inference of law is final."

In *Birdsall* v. *Russell*, 29 N. Y. 220-250, the Court of Appeals said:

"There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former may be said to furnish a clue—a reasonable and natural clue, to the latter."

Under this rule, the uncontradicted evidence before the department conclusively shows that Anicker had a clue, and, as said by Mr. Pomeroy, "a tangible clue." (Pom. Eq. Jur. Vol. 2, Sec. 597.) Anicker was informed that Roy Scales had taken the lease, and this information, if not equivalent to actual notice that the defendants had a lease, Scales being

their agent taking the lease, furnished Anicker a tangible clue, and as a reasonably prudent man, he should not have failed to investigate it. Both Anicker and Robert Fish, his agent in the very transaction, had actual notice that Roy Scales had taken the lease, and whether or not we shall say this was actual notice that the defendants had obtained the lease, the information, the fact, was a tangible clue which would have, when tracked down, disclosed the defendants' lease.

This identical point was passed upon in *Shulthis v. McDougal*, 170 Fed. 529.

In that case the question arose as to whether the McKays, the purchasers of the land from Berryhill, the lessor, had actual notice of the prior lease to Shulthis. The lessor testified that two parties had obtained prior thereto a lease, but that he did not know that Shulthis was the lessee. He testified that at the time he made the trade with the McKays, he told them that he had executed an oil and gas mining lease before that to McElwane and Chaney; that he knew Chaney, but was not acquainted with McElwane. The evidence showed that Chaney and McElwane were the agents of Shulthis. The McKays testified that at the time they bought the land from the lessor, they inquired if he had signed any papers of any kind against the land prior to that, and that the

lessor told them he had not signed any papers, but afterwards said that he did sign some kind of papers, but he didn't know who they were to, what they meant, but that the papers were no good, because the parties came back and wanted him to re-execute and sign them over again, and he would not do it. Upon receiving this information, the McKays paid a part of the consideration, and declined to pay the balance until they had obtained an abstract of title to the property. This they immediately did, and the abstract showed the title to be clear, and they then paid the balance of the consideration.

In speaking of the testimony of the McKays and the testimony of the lessor, Judge AMIDON said:

> "This evidence makes a close case on the question of notice. If Berryhill (meaning the lessor) in fact told the McKays the name of the parties to whom he had executed the papers, they, of course, could not have accepted his statement that the papers were invalid, but would have been charged with the duty of consulting the other parties to the transaction, and ascertaining from them the nature and extent of their rights. Failure to do so would have impressed the land in their hands with all the rights of those parties. The question of notice, therefore, turns upon whether the preponderance of the evidence shows that the McKays knew, or could by the exercise of reasonable care have ascertained, the name of the parties holding

these outstanding rights. The testimony of the McKays on this point is directly in conflict with that of Berryhill."

The Shulthis case seems to be exactly in point.

In *Cooper* v. *Flesner*, 24 Okla. 47, the Supreme Court reviews the Oklahoma Statutes and discusses the question of implied actual notice. The court said:

> "Section 12, c. 16, par. 888, under the title, 'Conveyances of Real Estate,' Wilson's Rev. & Ann. St. 1903, provides: 'Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided; except, actual notice to such third persons shall be equivalent to due acknowledgment and recording.'
>
> "Our statutes defining notice are found in chapter 28, entitled, 'Definitions and Provisions,' Wilson's Rev. & Ann. St. 1903, sections 9-13, inclusive, which are as follows: '*Sec. 9.* Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even though the forms of technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. *Sec. 10.* Notice is

either actual or constructive. *Sec. 11.* Actual notice consists in express information of a fact. *Sec. 12.* Constructive notice is notice imputed by law to a person not having actual notice. *Sec. 13.* Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.'

"The question which then presents itself is: Was the information which plaintiff contends was given defendant at the time of his visit to the Cooper home in January or February, 1900, given, and if so, was it either actual or constructive notice? It will be observed that section 13, *supra*, charges every person with constructive notice of the fact itself when, having actual notice of circumstances sufficient to put a prudent man upon inquiry, he omits to make such inquiry with reasonable diligence.

"In *Williamson* v. *Brown*, 15 N. Y. 354, the Court of Appeals of New York, dealing with this question, speaking through Justice SELDEN, said: 'Notice is of two kinds—actual and constructive. Actual notice embraces all degrees and grades of evidence from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts, and, like legal pre-

sumptions, does not admit of dispute. "Constructive notice," says Judge STORY, "is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." Story's Eq. Juris., Sec. 399. A recorded deed is an instance of constructive notice. It is of no consequence whether the second purchaser has actual notice of the prior deed or not. He is bound to take, and is presumed to have, the requisite notice. So, too, *notice to an agent is constructive notice to the principal;* and it would not in the least avail the latter to show that the agent had neglected to communicate the fact. In such cases the law imputes notice to the party whether he has it or not. Legal or implied notice, therefore, is the same as constructive notice, and cannot be controverted by proof.'

"This question is also elaborately treated by the Supreme Court of Wisconsin in the case of *Brinkman* v. *Jones*, 44 Wis. 498, wherein the court held in the syllabus: 'One who purchases land with knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely to his vendor, is guilty of bad faith if he neglects to make such inquiry, and is chargeable with the "actual notice" he would have received.' See also, *Hooser* v. *Hunt*, 65 Wis. 71, 26 N. W. 442, and *Pope* v. *Nichols*, 61 Kan. 230, 59 Pac. 257.

"The Statutes of California on this question are very similar to our own. They will be found embraced in sections 18 to 19 of the

Civil Code. The case of *Prouty* v. *Devin et al.*, 118 Cal. 258, 50 Pac. 380, was one somewhat similar to the one at bar, in which the court said: 'Section 1217 of the Civil Code provides that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof. Notice is actual and constructive. Actual notice is that which consists in express information of a fact, and constructive notice is that which is imputed by law. Civ. Code, Sec. 18. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact." (Civ. Code, Sec. 19,) * * * for the general doctrine, as well as the express provision of Sec. 19 of our Civil Code, is that whatever puts a party on inquiry amounts in judgment of law to constructive notice, provided the inquiry becomes a duty, and, if followed, would lead to the knowledge of the requisite facts by ordinary diligence and understanding.'

"After reciting the evidence in the case, the court concluded the opinion by saying: 'The question for determination is whether there was actual notice upon the part of Bates of circumstances sufficient to put him as a prudent man upon inquiry. If so, then in law he is chargeable with constructive notice and knowledge of the fact of this pre-existing mortgage.'

"Mr. Wade in his work on the Law of Notice, dealing with this question (sections 3, 4 and 5), says: 'Actual notice has been defined

by declaring that it exists "when knowledge is actually brought home to the party to be affected by it." This excludes all notice which does not amount in fact, as well as theory, to a c t u a l knowledge. There can be no doubt that this definition is too narrow. * * * The courts have accordingly refused to confine actual notice within the narrow limits of the definition quoted above. Their departure from the rule that renders actual notice and actual knowledge synonymous terms, is perhaps m o s t conspicuous in cases arising under the registry laws, where, in order to give precedence to a prior unrecorded instrument over a subsequent one affecting the same land, which has been duly recorded, it is necessary to prove that the subsequent purchaser had actual notice of the prior unregistered instrument. * * * There are two classes of actual notice which for convenience may be designated as *(1)* express, which includes all knowledge or information coming to the party to be charged of a degree above that which depends upon collateral inference, or which imposes upon him the further duty of inquiry; and *(2)* implied, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them. In other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest.'

"The author in section 8 further discusses the notice which he terms 'implied,' by stating that it does not include either positive knowl-

edge or information so direct as to necessarily carry conviction to the mind of the person notified and neither does it belong to that class which depends upon legal presumption, but that it is substantial evidence, from which the jury after estimating its value may infer notice. He then says that it differs from constructive notice with which it is frequently confounded and which it greatly resembles with respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, or resting upon strictly legal inference while implied notice arises from inference of fact. The language of our statute it will be observed in this connection is that the party having actual notice of circumstances, etc., is deemed to have constructive notice of the fact itself; so that it seems to us the constructive notice of our statute and the implied notice referred to by Mr. Wade are almost, if not exactly, the same in legal effect."

Some of the authorities hold that if mere want of caution as distinguished from wilful and fraudulent blindness is all that can be imputed to the purchaser, he cannot be held chargeable with notice. The weight of authorities seems to hold, however, that it is not necessary to show fraud on the part of the purchaser, but that gross negligence is sufficient; that is, that the basis of imputing notice to the purchaser is not merely that he might have acquired the knowledge in question, or, on the other hand, that

he was guilty of fraud in not acquiring it, but that he ought to have acquired it and would have done so but for his gross negligence attending the transaction.

—23 Am. & Eng. Enc. of Law, 2nd ed., page 498.

Pomeroy's Equity Jurisprudence, Vol. II, Sec. 597, states the rules applicable to these facts, as follows:

> "If it appears that the party obtains knowledge or information of such facts which are sufficient to put a prudent man upon inquiry, and which are of such nature that the inquiry if prosecuted with reasonable diligence would certainly lead to a discovery of the conflicting claim, then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry; that he made the inquiry and arrived at the truth.
>
> "If it appears that the party has knowledge of such facts sufficient to put a prudent man upon inquiry and that he wholly neglects to make any inquiry, or having begun it fails to prosecute it in a reasonable manner, then also the inference of actual notice is necessary and absolute.
>
> "These propositions embrace all instances of actual notice proved by circumstantial evidence, each depending upon its own particular circumstances."

Jones on Mortgages, Vol. 1, 553, states it thus:

"If a purchaser put upon inquiry fails to prosecute it with due diligence, he is conclusively presumed to have notice of the facts that a due inquiry would have disclosed. When it is shown that a purchaser had knowledge of facts sufficient to put him on inquiry as to the existence of some right or title in conflict with the title or interest he is about to purchase, he is presumed to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser. He is chargeable with notice of all facts that he might have learned by the exercise of reasonable diligence prosecuting the inquiry in the right direction."

See also, *Randall* v. *Lingwall*, 73 Pac. 1, and the case of *The Connecticut Mutual Life Ins. Co.* v. *Smith*, 117 Mo. 261, where the court aptly remarks:

"Courts of equity, since their earliest foundation, have always recognized that still small voice of suggestion, emanating from conscience, and provocative of inquiry, is as potent to impart notice as of presidential proclamation, or an army with banners."

In *Oliver* v. *Sanborn*, (Mich. 1886) 27 N. W. 530, the court said:

"Good faith is not less important than the payment of value, and is not to be determined

alone upon the testimony of the party, that he acted in good faith; but he must show from the inception to the conclusion of the transaction he had no notice or knowledge that could affect his conscience, or render it inequitable for him to make the purchase.

"He is chargeable with notice, not only where the evidence raises the presumption that he knew, but where there is ground for inferring that reasonable diligence would have led to a discovery of the truth.

"One who wilfully remains ignorant where the right of a third person is concerned is as much in default as if he had the knowledge which he avoids. The question, therefore, is not merely did the 'plaintiff' know, but had he sufficient information to render it his duty to inquire, and would an investigation, in the ordinary course of business have led to the discovery of 'the title claimed by the opposite party.'

"A person cannot be an innocent purchaser of land which his grantor informs him has been already conveyed by him to another person."

The case of *Pure* v. *McDonald*, (Md. 1851) 54 Am. Dec. 660, is very much like the case at bar. In that case it was said:

"The second objection is one of more difficulty and will require some examination. It involves the question whether Folck had notice of the prior equity of McQuire. On this subject the authorities are not uniform.

"We find it admitted, that after the sale, but before the payment of the purchase money, Folek was informed of the existence of the deed of trust by McDonald, but immediately following that information McDonald declared that the money intended to be secured by the deed had been fully paid. Did the accompanying information as to the payment of the money release Folek from the necessity of making further inquiry into the truth of that matter?

"Can it be supposed that a man of ordinary prudence would have made the purchase under these circumstances, without obtaining more satisfactory information? There is not a word about having any receipts for the money, nor is there any excuse or reason assigned for not having them. * * * (Discussion)

"We concede it to be true, as stated, that McDonald did inform Folek that the money secured by the deed of trust was fully paid, and that there was no claim against the land for any money due and unpaid under said deed. * * *

"Failing to make proper inquiry, he was guilty of negligence to a degree which must charge him with notice of the lien and of its existence; especially as he was informed that the deed was designed to create an encumbrance upon the very land he was about to purchase."

In the English case of *Whitbread* v. *Boulnois*, 1 You. and Coll. Ex. R. 303, it is said:

"The plaintiff was a London brewer and supplied one Jordan, who was a publican, with

beer. It was the common practice among brewers in London to lend money to publicans whom they supplied with beer, upon the deposit of their title deeds. Jordan had deposited certain title deeds in accordance with this custom. He afterwards gave Boulnois, a wine merchant, a mortgage upon the property covered by the deeds deposited. The mortgage was recorded. Boulnois had notice of this custom existing among brewers and publicans, but he made no inquiry of the brewer. The suit was brought to enforce the equitable mortgage arising from the deposit of the deeds.

"Baron Alderson held that notice to Boulnois was sufficient to make it his duty to inquire as to the existence of the deposit; that his not doing so was evidence of bad faith, and the plaintiff's rights under his equitable mortgage were sustained."

The rule was laid down as follows:

"When a party having knowledge of such facts as would lead an honest man, using ordinary caution, to make further inquiries, does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which if he had used such ordinary diligence he would readily have ascertained."

It, therefore, appears from the record submitted to the Interior Department, that the plaintiff, Anicker, was not a *bona fide* purchaser. Anicker must

stand or fall upon the record before the department. The court certainly has no power to hear other and further evidence on the question of his *bona fides*—that being a material and vital point, according to his contention before the department. The record has been made, the die cast, and the Rubicon crossed, and the plaintiff must stand or fall on the record before the department on the principle announced and reasons therefor stated in *James* v. *Germania Iron Company*, 107 Fed. 597, and *Ross* v. *Wright*, 29 Okla. 186. If the court should hear other and further evidence, then the court would try the matter *de novo* and substitute itself for the Secretary of the Interior, and sit not to review the proceedings before the Secretary with a view to ascertaining whether or not the Secretary committed a clear error of law, but to try the controversy with a view to deciding whether or not Ancker's lease, as an original proposition, should be approved. Such would be substituting the court's approval for that of the approval of the Secretary, though the statute confers that power exclusively on the Secretary.

Point Eight.

The Secretary of the Interior had express authority to prescribe rules and regulations, and the rule allowing thirty days after the execution of a

lease within which to file the same in the office of the Indian Superintendent at Muskogee is valid.

The courts take judicial notice of the rules and regulations of the department; *Caha* v. *United States*, 152 U. S. 211-222; and the power of the Secretary to prescribe rules will be found discussed in the following cases: *U. S.* v. *Eaton*, 144 U. S. 677; *U. S.* v. *Birdsall*, 233 U. S. 223; *U. S.* v. *Bailey*, 9 Peters 253; *Wilkins* v. *U. S.*, 96 Fed. 837; *U. S.* v. *Thurston County*, 143 Fed. 291 (8 Cir. Ct. Ap.); *Dastervignes* v. *U. S.*, 122 Fed. 30; *U. S.* v. *Ormsbee*, 74 Fed. 207, and *Simmons* v. *Whittington*, (Okla.) 112 Pac. 1020.

The Act of Congress of 1897 declared that the Secretary of Agriculture "may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violations of the provisions of this act or such *rules* and regulations shall be punished as provided in section 5388 of the Revised Statutes."

In *U. S.* v. *Grimaud*, 220 U. S. 506, the defendant, being indicted for violating the rules and regulations of the Secretary, challenged their validity on the ground that they were legislative in effect, and that the Act of Congress was unconstitutional in that it delegated to the Secretary legislative power. The

Supreme Court sustained the validity of the rules, holding that the Act of Congress did not delegate legislative power, but merely conferred an administrative function.

Point Nine.

Neither the recording laws, putting in force in the Indian Territory sections 670 and 671 of Mansfield's Digest, nor the recording laws of Oklahoma, are applicable or in force with respect to a departmental oil and gas lease.

It is true that section 20 of the Act of Congress of April 26th, 1906, (34 Stat. L. 137) provided that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments "now in force in said Indian Territory." But certainly all the Arkansas laws in force in the Indian Territory were repealed by the Oklahoma Enabling Act (34 Stat. L. 267). The last sentence in section 21, among other things provided, "And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as

elsewhere within the United States." This was nothing more nor less than a consent upon the part of the Federal Government that the Constitution of the new state might put in force in the state the laws of Oklahoma Territory insofar as not in conflict with any general or special Act of Congress and that is exactly what the Oklahoma Constitution did in section 2, Art. 25.

The Court of Appeals in *Shulthis* v. *McDougal*, 170 Fed. 529, held that the Act of Congress of February 19th, 1903 (32 Stat. L. 841), extending the recording laws of Arkansas over the Indian Territory, required departmental oil and gas mining leases to be recorded as other instruments in order to impart notice to subsequent purchasers. Section 20 of the Act of April 26th, 1906, was nothing more than a reenactment of the Act of February 19th, 1903, and was evidently intended to apply only during territorial days.

The United States Court clerks in the Indian Territory were ex-officio recorders under the Act of February 19th, 1903, and these courts and their clerks having been abolished by the Enabling Act, and provision made for the transfer of their records to the state courts, it is clear that section 20 of the Act of April 26th, 1906, had no field for operation after statehood, because such leases could not be recorded after statehood "in conformity to the law applicable

to recording instruments (now) in force in said Indian Territory."

The Enabling Act was approved June 16th, 1906, and the amendment thereto approved March 4th, 1907. With the state in process of organization, and its early admission in view, Congress, by the Act of March 1st, 1907 (34 Stat. L. 1026), provided that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice." While that act says, "any lease," it must be construed in the light of its purpose. It contemplated just such leases as were required by law to be approved by the Secretary, and under the Secretary's rules, required to be first filed in the office of the Indian Agent or Superintendent at Muskogee. The Secretary, in the first rules and regulations prescribed back in 1902, required all leases requiring his approval to be first filed in the office of the Indian Agent at Muskogee. So this Act of Congress of March 1st, 1907, is a legislative recognition of the Secretary's rule requiring leases to be presented to and filed in the office of the Indian Agent at Muskogee.

Coming down to the Act of May 27th, 1908 (35 Stat. L. 312), section 2 provides "that leases of restricted lands for oil, gas or other mining purposes, etc., may be made, with the approval of the Secretary

of the Interior, *under such rules and regulations provided by the Secretary of the Interior, and not otherwise.*" Here Congress recognized the validity of the rules and regulations of the Secretary then in force, and by this provision effectually ratified the rules of the Secretary then in force, and his rule allowing thirty days in which to file a lease being then in force for about six years, was certainly approved by Congress. Therefore, taking the Act of March 1st, 1907, making the filing of the lease in the Indian Agent's office constructive notice, and, considering that act with section 2 of the Act of May 27th, 1908, it seems clear that Congress provided a sole, separate and distinct method of constructive notice with respect to departmental leases. After statehood Congress was not able to control the recording laws of the state, nor make departmental leases eligible to registration under *the state laws* preceding approval by the Secretary. The filing of the lease in the Indian Agent's office at Muskogee (that being a Federal Government office), where it had to be first filed, was made constructive notice, and after the Secretary's approval the parties could record their leases under the state laws. But all persons are presumed to know what citizens or members of the tribe may lease their lands with or without approval of the Secretary, and when a party is dealing with the lands of a tribal member, he is chargeable with notice of

whether or not that particular member can lease his land with or without the Secretary's approval. Finding that the tribal member cannot lease without the Secretary's approval, then the prospective purchaser or lessee has notice that he may ascertain from the office of the Indian Superintendent at Muskogee whether or not a prior lease had been executed, and what action, if any, had been taken by the department.

Suppose the lease is eligible to record under the state laws after approval, yet, until approved, it is not a completed instrument, and if recorded under the state laws in the office of the Register of Deeds prior to the Secretary's approval, it is a cloud upon the title *if disapproved.*

So Congress had in mind a harmonious system. The *filing* of the lease in the Indian Superintendent's office is constructive notice, and if approved by the Secretary it may be recorded under state laws. This affords ample protection to all purchasers and lessees. The Secretary recognizing that under his rules requiring the execution of a bond and other instruments a lease cannot be presented for filing or registration within a nominal time after execution, allowed thirty days in which to file the lease, and the necessity and reasons for this rule are well stated in the Secretary's opinion (record, p. 52), as follows:

"The lengthy discussion of this point in the briefs does not convince me that the recognized rule of the department should be changed, or should be waived in this case. It has been long established and is well understood. It is suited to the conditions in which oil and gas leasing business is carried on. In very many cases, a considerable time is required, after the signature of a lessor is obtained, for the execution by the lessee, the making of the bond and other papers. The Secretary, in the exercise of the power vested in him by law, has given thirty days for this purpose. The only inconvenience which may follow the enforcement of the rule, is where some enterprising person, *in keen competition to secure* a promising piece of land, induces the allottee to execute a lease to him, after he had already leased it to another; and having filed his lease at the agency, is subsequently informed that the lease executed prior to his has been duly filed and taken precedence. For these reasons the lease to W. J. Anicker (No. 22568) has been disapproved."

The Act of May 27th, 1908, section 2, having authorized the Secretary to make rules, and a rule requiring that leases be first filed in the office of Indian Superintendent at Muskogee being then in force, it appears that considering together the Act of March 1st, 1907, making the filing of the lease in the office at Muskogee constructive notice and the Act of May 27, 1908, authorizing the Secretary to make

rules on the subject of presenting the lease, etc., that is, considering the two acts together it appears that while Congress made the Indian office at Muskogee a place of record for leases so as to impart constructive notice, it delegated to the Secretary full power to arrange all details, and method of filing and necessarily the time such lease should be filed after its execution. The many things required of the lessee by the Secretary, such as bonds and affidavits, etc., entailed delay in many cases, such as in this case for instance where defendants were non-residents and required to personally execute the lease, though they had an Oklahoma agent. The Secretary certainly had authority to *limit* the time after date of lease in which to present it to him for his action. This was reasonable and proper to prevent speculation. Thus, his thirty day rule as follows:

> "*Sec. 2.* All leases shall be in quadruplicate and with the papers required shall be filed within thirty days from and after the date of execution by the lessor with the United States Indian Agent at Union Agency, Muskogee, Oklahoma."
>
> "*Sec. 6.* Oil and gas leases shall be accompanied when filed, with application made under oath on blank prescribed, Form B: leases for other mineral purposes shall be accompanied by application on Form L. These applications shall state specifically with what other persons, firms or corporations the lessee is interested,

> either directly or indirectly, in oil or gas or other mineral leases of lands in the Five Civilized Tribes. The department, in every case, reserves the right, at any time, to make further inquiry as to the standing and business ability of any prospective lessee."
>
> "*Sec. 41.* Applications, leases and other papers must be upon form prepared by the department and upon application the Indian Agent at Muskogee, Oklahoma, will furnish prospective lessees with such forms at a cost of one dollar per set; copies of such forms are printed herewith."

Now, if he had authority to make a rule limiting time to file lease, he likewise had authority to allow time in which to *fully comply with* his general rules, and their validity is not questioned by plaintiff's counsel.

The rules provided that the forms of the leases should be those purchased from the Indian Superintendent; that they should make an application, make a financial showing of the responsibility of the prospective lessee, give a bond and agree to certain specified royalties and rentals provided in the lease form. Among other things it was provided that the lease should be executed in quadruplicate and that the four copies should be filed with the Indian Superintendent, showing clearly that there was no intention of the department that these leases should be

recorded, at least, until after they had been approved by the Secretary and the parts distributed to the lessor, lessee, and the respective Indian offices. In other words, the department did not even regard the party named as the lessee in the lease as the real lessee until after the approval, as is evidenced by the language of section 41, which provides what form shall be furnished to *prospective lessees*.

In section 6, they use this language also:

> "The department, in every case, reserves the right, at any time, to make inquiry as to the standing and business ability of any *prospective* lessee."

There are many different registration acts in the United States, a great many of them being largely different. In a majority of the states, however, it is usual that the recording of a deed in order to cut off subsequent *bona fide* purchasers, would have to be made prior to the subsequent purchase. There are a few states, however, which allow different times for deeds to be filed and if filed in that time they have the effect of making valid all of the conveyance, even as against subsequent purchasers. Mississippi has a statute that authorized the recording of a deed within a stipulated period after its execution, as we remember, thirty days.

Devlin on Deeds, paragraph 624, lays down this doctrine:

> "*Effect of Statute Giving Time to Record Deeds.* Where, by the provision of the statute, a purchaser is allowed a specified time after the execution of a deed in which to procure its registration, the deed takes effect as it would if such statute did not exist, that is, from its delivery. It is valid from delivery as against subsequent purchasers. A deed thus recorded within the statutory period will prevail over the deed of a person who purchased the property after the execution of a former deed but before it was filed for registration."

This doctrine was followed by the Supreme Court of Mississippi, in *Claiborne* v. *Holmes*, 51 Miss. 146.

Our own Supreme Court, in the case of the *First Bank* v. *The National Bank*, 76 Pac. 130, announces the doctrine that

> "Requirements imposed by statute as to the execution of an instrument are necessarily to be complied with or it will not give constructive notice, even if placed of record."

This court in *Lynch* v. *Murphy*, 161 U. S 247, 40 L. ed. 688, held:

> "Constructive notice is not given by the record of an instrument which is not executed within the formalities required by law in order to entitle it to be recorded."

Speaking with reference to the proposition of the statutes allowing certain times for deeds to be filed, one of the leading cases on the subject was handed down by this court in *Shiras* v. *Craig*, 7 Cranch. 51, 3 L. ed. 265, wherein this court said:

> "By the laws of Georgia, a deed is valid if recorded within twelve months but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time or previously on the record. * * * It appears to the court that neither negligence nor that fraud which is inferred from the mere fact of omitting to place a deed on record can, with propriety, be imputed to the person who has used all the dispatch that the law requires. * * * If subsequent purchasers without notice sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisition."

This court, in *Clark* v. *White*, 12 Peters 179, 9 L. ed. 1046, said:

> "By the common law, a deed of lands is valid without registration, and where register acts require deeds to be recorded they are valid until the time prescribed by the statute, has expired, and if recorded within that time, are as effectual from the date of execution as if no register acts existed."

Defendants had thirty days to file their lease, and when filed within the thirty days, by analogy to the registration laws, *supra*, it took effect by relation as of its date of execution and cut off intervening leases.

We, therefore, respectfully submit that the decree of the trial court should be affirmed.

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